Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–504 OF 2004
ABDUL MALIK ISHAK J
16 JUNE 2007

Civil Procedure — Summary judgment — Loan facility — Whether proper case to grant summary judgment — Whether triable issues raised — — Whether payments made by the borrower or defendant

Constitutional Law — Fundamental liberties — Equality before the law — Whether necessary degree of discrimination established — Validity of provision of Pengurusan Danaharta Nasional Act 1998

The plaintiff is corporation incorporated under the Companies Act 1965 and vested with statutory rights and powers under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'). The first defendant is the owner of the property in question. The second defendant is collectively all those persons who are unknown and who occupy the property whether lawfully or unlawfully. Arab-Malaysian Bank Berhad ('AMBB') held a third party first fixed charge and a third party second fixed charge over the property. The plaintiff was vested with the rights, title and interest of AMBB under, inter alia, the overdraft facility and the first legal charge and the second legal charge. The said property has been duly sold by the plaintiff to a third party pursuant to, inter alia, the powers accorded to the plaintiff as a chargee of the said property under the Act. Despite requests by the plaintiff to the defendants, the defendants failed, refused and/or neglected to surrender vacant possession of the said property to the plaintiff. The plaintiff filed an application for summary judgment against the defendants in this action inter alia for the defendants to surrender vacant possession of the property. It is the defendants' contention that the overdraft facility from AMBB to the borrower is tainted by a 'wrongful interest' claim and this, according to the defendants, impinges upon the exercise by the plaintiff of its statutory rights and powers of sale of the said property.

Held, allowing the application:

(1) The borrower continued to make periodic payments towards settlement of its indebtedness, both to AMBB and then to the plaintiff upon vesting. Despite the decision of the originating summons and the defendants' insistence herein that such a decision is binding and would disentitle the plaintiff from disposing of the said property, the borrower and/or the defendants themselves have voluntarily disposed of or agreed to the disposal of other properties held as security for the facility towards settlement of their indebtedness to the

plaintiff. In fact, in the course of making its periodic payments to AMBB and/or the plaintiff, the borrower has made payment specially towards settlement of the outstanding interest under the overdraft facility (see para 15).

(2) In requesting the plaintiff to take over its indebtedness from AMBB, the borrower made the representation that it would settle its indebtedness, both principal and interest, and is deemed to have conceded and agreed to be subject to the plaintiff's statutory rights and powers. In making partial payments to AMBB and to the plaintiff towards settlement of its indebtedness even after the decision in the originating summons, the borrower has perpetuated in the eyes of both AMBB and the plaintiff, its acquiescence to the quantum of its indebtedness which includes both the principal and the interest sums. Given these clear avowals by the borrower, it flies in the face of equity and good faith for the defendants or the borrower to now attempt to use the allegation of 'wrongful interest' as a shield from the consequences of their own actions (see para 16).

(3) The plaintiff's exercise of its powers to sell charged property may be subject to challenge. But, such a challenge if mounted is limited by the scope and breadth of the plaintiff's powers under the Act. Indeed the sale by private treaty and the invocation of s 57 of the Act cannot and ought not be the subject of judicial restraint or curtailment otherwise it would make a mockery of the intent and purpose of ss 57 and 72 of the Act. Consequently, questions pertaining to the validity or regularity of the sale ought not to affect the proceedings hereunder for vacant possession (see para 18).

(4) The disposition of the said property is no longer an issue here. The sale of the said property has been done. It is not possible, at this juncture, for the defendants to challenge a sale under s 57 of the Act or to try to restrain or invalidate it or even to try to restrain the plaintiff's application for vacant possession of the said property. The defendants' remedy for any impropriety in the sale of the said property, which the plaintiff denies, lies in damages only, and such a claim for damages is separate from, and certainly cannot bar, the present application for vacant possession (see para 21).

(5) A decision in an order for sale proceedings does not bind the parties nor this court. It is a decision not based on the merits of the case. In determining proceedings under an order for sale, the court is not empowered to make any findings of fact (see para 31).

(6) It can be surmised that the interest rate charged by the plaintiff is the same as that prescribed under the first facility agreement. The only difference now is that the plaintiff follows the BLR fixed by Malayan Banking Berhad and not that of AMBB. It must be emphasised that the defendants and the borrower have never disputed or challenged the rate of BLR charged on the facility. The interest rate charged by the plaintiff at 2% per annum above BLR is lower than that prescribed in the later facility agreement. There is clearly no detriment to the borrower if a lower rate than that prescribed in the facility agreement is levied on the overdraft facility (see para 39).

(7) Section 14(4)(m) of the Act does not discriminate – it applies alike to all persons falling under the term 'obligors'. Article 8(1) of the Federal Constitution does not proclaim that all persons must be treated alike, but only that persons in like circumstances must be treated alike. In any event, the limitation to or loss suffered by an obligor under s 14(4)(m) of the Act is not a substantive right but a procedural one in that the rights of the obligor are not forfeited; merely limited to monetary relief. By the same token the defendants have not shown what is the 'fundamental right' guaranteed by the Federal Constitution to the defendants that is allegedly being forfeited in this case. Even if there is discrimination, it is a permissible discrimination in that the classification of a group of people as 'obligors' is based on an 'intelligible differentia' where that differentia has a 'rational relation to the object sought to be achieved' by the Act. The purpose of the Act was to create special provisions in the public interest to dispose of impaired assets of financial institutions by, inter alia, promptly and efficiently resolving non-performing loans and removing other assets and liabilities of such institutions. The ultimate goal of Parliament was to revitalise the national economy after the global economic crisis of the late 1990s. To this end, the plaintiff was incorporated to, inter alia, undertake and enforce the provisions of the Act. As stated above, the individuals or bodies targeted at were those with non-performing loans in certain financial institutions. The borrower and the first defendant in this case are such bodies or persons where the 'non-performing loan' was the debt that had accrued in the overdraft facility account held with AMBB. For the foregoing reasons, there is thus a reasonable classification of the persons falling within s 14(4)(m) of the Act and a nexus between the said provision and the object of the Act, and, consequently, the said section is not inconsistent with the qualified provision of equality under art 8 of the Federal Constitution and therefore it is not void under art 4(1) of the Federal Constitution (see para 69).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat yang diperbadankan di bawah Akta Syarikat 1965 dan terletak hak dengan hak-hak statutory dan kuasa di bawah Akta Pengurusan Danaharta Nasional Berhad 1988 ('Akta'). Defendan pertama adalah pemilih harta tanah yang dipersoalkan. Defendan kedua adalah kesemua yang bersesama mereka yang mana adalah tidak diketahui dan yang menduduki harta tanah sama ada secara sah atau tidak sah. Arab-Malaysian Bank Berhad ('AMBB') memegang gadaian tetap pertama pihak ketiga dan gadaian tetap kedua pihak ketiga ke atas harta tanah tersebut. Plaintif telah meletak hak ke atas hak-hak, hak milik dan kepentingan kepada AMBB di bawah, antara lainnya, kemudahan overdraf dan gadaian pertama serta gadaian kedua. Harta tanah tersebut telah dijual oleh plaintif kepada pihak ketiga menurut, antara lain, kuasa yang diberikan kepada plaintif sebagai pemegang gadaian harta tanah tersebut di bawah Akta. Walaupun permintaan oleh plaintif kepada defendan-defendan, defendan-defendan telah gagal, enggan dan/atau mengabaikan untuk menyerahkan milikan kosong harta tanah tersebut kepada plaintif. Plaintif telah memfailkan satu permohonan untuk penghakiman terus

terhadap defendan-defendan, dalam tindakan ini, antara lain untuk defendan-defendan menyerahkan milikan kosong harta tanah. Adalah penegasan defendan-defendan bahawa kemudahan overdraf daripada AMBB kepada peminjam telah dicemari dengan 'kepentingan salah' yang dituntut dan ini, menurut defendan-defendan, mempengaruhi ke atas perlaksanaan oleh plaintif hak-hak statutory dan kuasanya berkenaan dengan penjualan harta tanah tersebut.

Diputuskan, membenarkan permohonan:

(1) Peminjam berterusan untuk membuat pembayaran berkala kea rah penyelesaian keberhutangannya, kedua-duanya kepada AMBB dan kemudiannya kepada plaintif apabila diletak hak. Walaupun keputusan saman pemula dan defendan-defendan menegaskan di sini bahawa keputusan tersebut adalah mengikat dan menyebabkan tidak berhaknya plaintif daripada menjual harta tanah tersebut, peminjam dan/atau defendan-defendan, mereka sendiri sukarela menjual atau bersetuju untuk menual harta tanah yang lain yang dipegang sebagai jaminan kemudahan terhadap penyelesaian keberhutangan mereka kepada plaintif. Sebenarnya, dalam siri membuat pembayaran berkala kepada AMBB dan/atau plaintif, peminjam telah membuat pembayaran terutamanya terhadap penyelesaian faedah tertunggak di bawah kemudahan overdraf (lihat perenggan 15).

(2) Dalam meminta plaintif untuk mengambil alih keberhutangannya daripada AMBB, peminjam telah membuat representasi bahawa ianya akan menyelesaikan keberhutangannya, kedua-dua wang pokok dan faedah, dan dianggap telah mengakui dan bersetuju untuk tertakluk kepada hak-hak statutori dan kuasa plaintif. Dalam membuat sebahagian pembayaran kepada AMBB dan kepada plaintif terhadap penyelesaian keberhutangannya walaupun selepas keputusan di dalam saman pemula, peminjam telah dikekalkan pada penglihatan kedua-dua AMBB dan plaintif, persetujuannya kepada kuantum keberhutangannya yang mana termasuk jumlah wang pokok dan faedah. Daripada pengakuan jelas peminjam, ianya tergolong sebagai equiti dan suci hati bagi defendan-defendan atau peminjam untuk sekarang ini cuba untuk menggunakan dakwaan 'kepentingan salah' sebagai satu perisai daripada akibat tindakan mereka sendiri (lihat perenggan 16).

(3) Plaintif melaksanakan kuasanya untuk menjual harta tanah yang digadaikan berkemungkinan tertakluk kepada cabaran. Tetapi, cabaran tersebut jika melebihi had oleh skop dan keluasan kuasa plaintif di bawah Akta. Sudah tentu penjualan melalui perjanjian persendirian dan penggunaan s 57 Akta tidak boleh dan tidak patut menjadi subjek sekatan kehakiman atau pembatasan jika tidak ianya akan menjadi satu sindiran kepada niat dan tujuan ss 57 dan 72 Akta. Selanjutnya, soalan-soalan berkenaan dengan kesahan atau ketetapan penjualan seharusnya tidak memberikan kesan prosiding ini untuk milikan kosong (lihat perenggan 18).

(4) Penjualan harta tanah tersebut tidak lagi menjadi isu di sini. Penjualan harta tanah tersebut telah pun dilakukan. Adalah tidak mungkin, pada peringkat ini, bagi defendan-defendan untuk mencabar penjualan di bawah s 57 Akta atau untuk mencuba untuk menghalang atau mentaksahkannya atau walaupun cuba untuk menghalang permohonan plaintif untuk milikan kosong harta tanah tersebut. Remedi defendan-defendan untuk ketidaksesuaian di dalam penjualan harta tanah tersebut, yang mana dinafikan plaintif, terletak dalam gantirugi sahaja, dan tuntutan sedemikian untuk gantirugi adalah berlainan dan sudah pasti tidak menghalang permohonan sekarang ini untuk milikan kosong (lihat perenggan 21).

(5) Keputusan di dalam prosiding perintah jualan tidak mengikat pihak-pihak ataupun mahkamah ini. Ianya adalah keputusan tidak berdasarkan merit kes. Dalam menentukan prosiding di bawah perintah untuk jualan, mahkamah tidak diberikan kuasa untuk membuat dapatan fakta (lihat perenggan 31).

(6) Ianya boleh diringkaskan bahawa kadar faedah yang dikenakan oleh plaintif adalah sama dengan ditetapkan di bawah perjanjian kemudahan pertama. Perbezaan sekarang hanya plaintif mengikut KPA yang ditetapkan oleh Malayan Banking Berhad dan bukannya AMBB. Ianya mestilah ditekankan bahawa defendan-defendan dan peminjam tidak pernah mempertikaikan atau mencabar kadar KPA yang dikenakan terhadap kemudahan tersebut. Kadar faedah yang dikenakan oleh plaintif pada 2% setahun di atas KPA adalah lebih rendah daripada yang ditetapkan di dalam perjanjian kemudahan kemudiannya. Adalah jelas tidak menjejaskan peminjam jika kadar lebih rendah daripada yang ditetapkan di dalam perjanjian kemudahan yang dikenakan ke atas kemudahan overdraf (lihat perenggan 39).

(7) Seksyen 14(4)(m) Akta tidaklah mendiskriminasikan – ianya terpakai sama kepada kesemua orang yang termasuk di bawah terma 'penanggung obligasi'. Artikel 8(1) Perlembagaan Persekutuan tidak mengisytiharkan bahawa kesemua orang mestilah dilayan sama, tetapi hanya orang dalam keadaan yang sama mestilah dilayan sama. Dalam apa jua keadaan, pembatasan kepada atau kerugian yang ditanggung oleh pemegang obligasi di bawah s 14(4)(m) Akta bukanlah hak substantif tetapi satu yang bersifat prosedural, oleh itu hak-hak pemegang obligasi tidak dirampas; hanya terhad kepada relif kewangan. Melalui tanda yang sama defendan-defendan tidak menunjukkan apa dia 'hak asasi' yang dijamin oleh Perlembagaan Persekutuan kepada defendan bahawa ianya telah didakwa dirampas dalam kes ini. Walaupun jika terdapatnya diskriminasi, ianya adalah diskriminasi yang dibenarkan di dalam klasifikasi perkumpulan orang sebagai 'pemegang obligasi' adalah berdasarkan kepada 'perbezaan yang difahami' di mana bahawa perbezaan mempunyai satu 'hubungan yang rasional kepada objek yang hendak dicapai' oleh Akta. Tujuan Akta adalah untuk membentuk peruntukan istimewa dalam kepentingan awam untuk melupuskan aset yang rosak institusi kewangan antara lain dengan segera dan secara efisyen menyelesaikan pinjaman tidak berbayar dan mengalihkan aset-aset dan liabiliti-liabiliti yang lain institusi tersebut.

Matlamat utama Parliamen adalah untuk menggiatkan ekonomi negara selepas krisis ekonomi global di akhir 1990 an. Akhirnya, plaintif telah diperbadankan, antara lain, menjalankan dan menguatkuasakan peruntukan Akta tersebut. Seperti yang dinyatakan di atas, individu atau badan yang menjadi sasaran adalah mereka yang tidak membayar pinjaman di dalam institusi kewangan yang tertentu. Peminjam dan defendan pertama dalam kes ini adalah badan atau orang yang 'tidak membayar pinjaman' adalah hutang di mana telah terakru dalam akaun kemudahan overdraf yang dipengang dengan AMBB. Untuk sebab-sebab di atas, terdapatnya klasifikasi orang yang munasabah termasuk di dalam s 14(4)(m) Akta dan hubungan di antara peruntukan tersebut dan objek Akta, selanjutnya seksyen tersebut adalah tidak selaras dengan peruntukan yang diluluskan berkenaan dengan ekuiti di bawah art 8 Perlembagaan Persekutuan and oleh itu ianya tidak terbatal di bawah art 4(1) Perlembagaan Persekutuan (lihat perenggan 69).]

Notes

For cases on loan facility, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3095–3097.

For cases on equality before the law, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1768–1784.

Cases referred to

Ajay Hasia v Khalid Mujib ('81) ASC 487

Arab-Malaysian Bank Bhd v Lian Yit Engineering Sdn Bhd & Ors [2000] 2 MLJ 51 (refd)

Berry v Berry [1929] 2 KB 316 (refd)

Cooper v Jarman [1866] LR 3 Eq 98 (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257 (refd)

Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155 (refd)

EP Royappa v State of Tamil Nadu & Anor [1974] 2 SCR 348 (refd)

Government of Malaysia v VR Menon [1990] 1 MLJ 277 (refd)

Hong Leong Finance Berhad v Rextex Rubber Products (M) Sdn Bhd & Anor [1996] 4 CLJ 580 (refd)

Lord Dudley and Ward v Lady Dudley [1705] Prec Ch 241 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Malaysia Credit Finance Bhd v Yap Hock Choon & Anor [1989] 2 MLJ 363 (refd)

Malaysian Bar & Anor v Government Of Malaysia [1987] 2 MLJ 165 (refd)

Maneka Gandhi v Union Of India [1978] 2 SCR 621 (refd)

Mohamed Sidin v PP [1967] 1 MLJ 106 (refd)

Osman & Anor v PP [1968] 2 MLJ 137 (distd)

PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)

PP v Khong Teng Khen & Anor [1976] 2 MLJ 166 (refd)

PP v Oh Keng Seng [1976] 2 MLJ 125 (refd)

PP v Su Liang Yu [1976] 2 MLJ 128 (refd)

Payne v Tennessee [1991] 501 US 808 (refd)

Ramana Dayaram Shetty v The International Airport Authority of India And Ors [1979] 3 SCR 1014 (refd)

A *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* [1958] SC 538 SR (refd)
Tan Hee Lock v Commissioner For Federal Capital & Ors; Haris Bin Idris v Commissioner For Federal Capital & Ors [1973] 1 MLJ 238 (refd)
Walsh v Lonsdale [1882] 21 Ch D 9 (refd)

B **legislation referred to**
Criminal Procedure Code s 418A
Federal Constitution arts 4(1), 8, 153, 160(2)
Indian Constitution art 14
Pengurusan Danaharta Nasional Berhad Act 1998 ss 14(4)(m), 15, 57, 72
Rules of the High Court 1980 O 14 r 7(1)

C *Mahaletchumi Balakrishnan (Skrine) for the plaintiff.*
Surendran Subramaniam (Suren & Ragu) for the defendants.

Abdul Malik Ishak J:

D **[1]** This is the plaintiff's application for leave to enter summary judgment against the defendants in this action for the following orders:

(i) that the defendants are to surrender vacant possession of the property held under title HS(D) 82855 (previously QT(R) 15215) PT15162, Mukim of Kuala Lumpur, district of Kuala Lumpur, Federal Territory that is also known as No 6, Lorong Bukit Pantai 4, Taman Bukit Pantai, 59100 Kuala Lumpur ('the said property') within 14 days from the date of the service of this order;

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(ii) costs;

(iii) costs on a solicitor and client basis; and such

F (iv) further relief that this honourable court deems just and proper.

THE GROUNDS IN SUPPORT OF ENCLOSURE 8

[2] They may be stated as follows:

G (a) the said property has been duly sold by the plaintiff to a third party pursuant to, inter alia, the powers accorded to the plaintiff as a chargee of the said property under the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'); and

(b) that despite requests by the plaintiff to the defendants, the defendants or any H of them have failed, refused and/or neglected to surrender vacant possession of the said property to the plaintiff.

In this judgment, the constitutionality of the Act is put in question and it is in this area that the defendants derive its strength.

I THE SALIENT FACTS

[3] They may be summarized in this fashion:

(a) the plaintiff is a corporation incorporated under the Companies Act 1965 and vested with statutory rights and powers under the Act;

(b) the first defendant is the owner of the said property;

(c) the second defendant is collectively all those persons who are unknown and who occupy the said property whether lawfully or unlawfully (fortunately, the defendants revealed the identity of the occupants of the said property and they will be mentioned later);

(d) that Arab-Malaysian Bank Berhad ('AMBB') held a third party first fixed charge ('first legal charge') and a third party second fixed charge ('second legal charge') over the said property; and

(e) that the first legal charge was granted on 15 July 1995 as security for the repayment of an overdraft facility of RM3m accorded to Lian Yit Engineering Sdn Bhd ('the borrower') by AMBB ('overdraft facility') while the second legal charge was granted on 21 May 1996 to secure an increase of the overdraft facility by the amount of RM1.5m.

[4] On and from 29 December 1999, the plaintiff was vested with the rights, title and interest of AMBB under, inter alia, the overdraft facility and the first legal charge and the second legal charge. On 4 February 2004, pursuant to its powers under s 57 of the Act, the plaintiff entered into a sale and purchase agreement with a person by the name of Kiron Chhotal Doshi ('the purchaser') for the sale of the said property to the purchaser. The defendants were duly informed of the said sale and were requested to deliver up vacant possession of the said property by a letter dated 6 February 2004 from the plaintiff's previous solicitors Messrs Sidek Teoh Wong & Dennis to the first defendant. The defendants did not comply with the said letter and as a result of which the plaintiff commenced this action for, inter alia, vacant possession of the said property. These are the facts emanating from the plaintiff's claim. I will allude, in due course, to the counterclaim of the first defendant.

THE PLAINTIFF'S CLAIM VERSUS THE FIRST DEFENDANT'S COUNTERCLAIM

[5] The first defendant is seeking, inter alia, for a declaration that the sale and purchase agreement dated 4 February 2004 between the plaintiff and the purchaser is an agreement which is unlawful and void and ought to be set aside. And in the event that this court finds in favour of the first defendant and allows the said declaration which has been sought for by the first defendant, it is submitted that such a decision will have the effect of extinguishing as a whole all rights and/or claims that the plaintiff may have against the defendants under the present suit. It is said that there is no question as to the validity and subsistence of the first defendant's counterclaim against the plaintiff because the first defendant's counterclaim has not been struck out by this court and neither is it the subject of any striking out proceedings. It is also submitted that in the face of the first defendant's valid and subsisting counterclaim against the plaintiff, it would seem that the plaintiff is being impervious to the said fact and has nevertheless thought it fit to file the application in encl 8 for summary judgment. Moving cautiously and still harping on this point,

the defendants submit that the plaintiff's application for summary judgment as is set out in encl 8 should fail in limine and the plaintiff should be ordered to pay the necessary costs forthwith to the defendants pursuant to O 14 r 7(1) of the Rules of the High Court 1980 ('RHC') which states as follows:

> 7. Costs (O 14 r 7)
>
> (1) If the plaintiff makes an application under rule 1 where the case is not within this Order or if it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to O 59, and, in particular, to r 4(1) thereof, the Court may dismiss the application with costs and may require the costs to be paid by him forthwith.

[6] The premise or presumption upon which the defendants' submission is based is that a party must apply to strike out a claim or a counterclaim if it deems it invalid and insubstantial. This submission is, with respect, plainly wrong in law — a fact which is evinced by the first defendant's inability to produce any legal authority to support such a proposition. The first defendant's proposition that the plaintiff's failure to strike out the counterclaim is an admission of the validity and subsistence of the Counterclaim is an even more preposterous proposition that, just because of this so-called failure to apply to strike out the Counterclaim, O 14 r 7(1) of the RHC has to be invoked since the plaintiff is deemed to have acknowledged the existence of a contention which would entitle the first defendant to an unconditional leave to defend. I think I must put the law in its correct perspective. If this court were to accept the first defendant's propositions and to dismiss the plaintiff's application in encl 8 on such a basis, this court would be concluding that, as a matter of law, a plaintiff will be disentitled to summary judgment on its claim if it has failed to first apply to strike out the first defendant's counterclaim. The irrationality, unfeasibility and sheer absurdity of such a conclusion is quite patent as evinced by the lack of legal authority adduced in support of such a proposition.

ARGUMENTS OF THE PARTIES

[7] According to the defendants, it is imperative that all the pertinent facts culminating in the commencement of the current suit should be set out for this court to appreciate, digest and finally pronounce a just and fair decision in respect of encl 8. I would certainly agree with such a submission. Now, the sale and purchase agreement in respect of the said property between the plaintiff and the purchaser was executed, as I said, on 4 February 2004. It is said that the sale and purchase agreement of the said property is governed by the following condition precedent:

> 2.3.3. Where the property is sold with vacant possession under sub-clause 2.2.2, Danaharta notifying the purchaser in writing that Danaharta is able to deliver vacant possession of the property to the purchaser.

That condition precedent has yet to be fulfilled and so it is submitted that the completion of the sale and purchase of the said property has not taken place and the

transfer of the said property to the purchaser has yet to be completed to date. It is also submitted that based on the terms of the sale and purchase agreement of the said property and the prevailing law, the purchaser is not a party who has a registrable or equitable interest in the said property as yet.

[8] By way of a rebuttal, the plaintiff rightly submits that the sale and purchase agreement of the said property has been executed and the purchaser certainly has an equitable interest in the said property. What is equity? It is said by some textbook writers to be a body of rules or principles which form an appendage to the general rules of law or a gloss over them. Lord Romilly MR in *Cooper v Jarman* [1866] LR 3 Eq 98 at 102 aptly said that:

> The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty.

Sir Nathan Wright LK in Lord Dudley and *Ward v Lady Dudley* [1705] Prec Ch 241 at 244, gave a classic eighteenth century definition of equity in this way:

> Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.

[9] Still on equity, I need to refer to two cases. The first would be the case of *Walsh v Lonsdale* [1882] 21 Ch D 9. The second case would be *Berry v Berry* [1929] 2 KB 316. In *Walsh v Lonsdale*, the facts may be stated as follows. There Lonsdale agreed in writing (but not by deed) to grant a seven years' lease of a mill to Walsh at a rent payable quarterly in arrear, but with a year's rent payable in advance if demanded. Walsh entered into possession without any lease having been granted and paid his rent quarterly in arrear. Subsequently Lonsdale demanded a year's rent in advance and, on Walsh refusing to pay, put in a distress. Walsh claimed an injunction and damages for illegal distress, on the ground that at law he was tenant from year to year at a rent not payable in advance, and that the legal remedy of distress was therefore not open to Lonsdale. The Court of Appeal decided that Walsh held on the same terms as if a lease had been granted, since the agreement was one of which the court would order specific performance. According to Jessel MR, There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one court, and the equity rules prevail in it. I will now set out the facts in Berry v Berry. Under a deed of separation a husband covenanted to pay his wife a certain allowance. Afterwards the parties made an agreement in writing not under seal reducing the allowance. An action brought by the wife to enforce the terms of the deed was dismissed on the ground that although at law a contract made by deed could be

varied only by another deed, in equity a simple contract varying the terms of a deed was a good defence to an action brought on the deed; and that the equity rule prevailed. Hence, only the reduced amount was payable.

[10] The defendants continue to set out the pertinent facts seen from their perspectives. The first defendant is the registered and lawful proprietor of the said property. The first defendant initially purchased the said property from Realty Development Corporation of Malaysia Limited on 22 July 1966. At the time of purchase by the first defendant, the said property was merely a vacant piece of land. Subsequently, the first defendant appointed Akitek Maju to obtain the approval to develop the said property from the relevant authorities and the relevant approvals were obtained on 15 November 1968. In due course, a double storey house was erected by the first defendant on the said property and the first defendant has lived there until the present time.

[11] At the present moment, it is emphasised that the first defendant is 87 years of age and has been living at the said property for more than 30 years.

[12] According to the defendants, all the other persons who are lawfully occupying the said property are Yoong Chun Fah (NRIC No: 530520–10–6487), Chong Lee Fah (NRIC No: 520627–02–5332), Yoong Yilin (NRIC No: 891102–14–6978), Yoong Daren (NRIC No: 840206–14–5937), Yoong Chin Fah (NRIC No: 550520–10–6498) and Yolando Sorbito (Passport No: FF 724004).

[13] Sometime in 1995, in consideration for a loan facility taken by Lian Yit Engineering Sdn Bhd from AMBB, the first defendant as a director of Lian Yit Engineering Sdn Bhd agreed to a third party charge to be entered by AMBB over the said property.

[14] It is the defendants' contention that the overdraft facility from AMBB to the borrower – Lian Yit Engineering Sdn Bhd, is tainted by a wrongful interest claim and this, according to the defendants, impinges upon the exercise by the plaintiff of its statutory rights and powers of sale of the said property. But, with respect, the defendants' challenge to the plaintiff's rights and powers lack credence in the light of the following factors:

(a) the borrower itself sought to have the plaintiff take over its indebtedness from AMBB, and this is after the decision of RK Nathan J, in *Arab–Malaysian Bank Bhd v Lian Yit Engineering Sdn Bhd & Ors* [2000] 2 MLJ 51 where his Lordship, inter alia, held that the defendant in that case had shown that by arbitrarily changing the scheme of interest, the plaintiff there had acted contrary to both law and equity. The defendants here claim that that case – referring to *Arab-Malaysian Bank Bhd v Lian Yit Engineering Sdn Bhd v Ors*, is authority for the proposition that the overdraft facility is tainted by wrongful interest. At this juncture, it is germane to reproduce the salient portions of the borrower's letter of request to Bank Negara Malaysia dated 14 December 1999

written by the first defendant as its managing director (see exh 'KMC–14' of encl 11 at pp 112 to 113):

> … syarikat kami telah … menghadapi banyak cabaran dan kesulitan semasa kemorosotan ekonomi yang lalu. Walau bagaimanapun kami mengatasinya dan membayar kesemua pinjaman bank serta faedah yang dikenakan.
>
> Kami sesungguhnya ingin menyelesaikan semua pinjaman bank tetapi kami memerlukan lebih masa untuk menjual projek komersial kami…
>
> Kami juga ingin memohon supaya kesemua pinjaman bank kami dapat dipindahmilik kepada Pengurusan Danaharta. Untuk membayar balik pinjaman ini kepada Pengurusan Danaharta, kami berharap Pengurusan Danaharta akan memberi lebih masa untuk menjual hartanah dan juga projek komersial kami.

[15] In the wake of its request, the borrower did not at any stage or in any manner raise with the plaintiff about that wrongful interest that had been charged by AMBB nor did it say that it would not settle the indebtedness. Even after and in spite of the decision of *Arab-Malaysian Bank Bhd v Lian Yit Engineering Sdn Bhd & Ors* ('the decision in the originating summons') the borrower continued to make periodic payments towards settlement of its indebtedness both to AMBB and then to the plaintiff upon vesting. And despite the decision of the originating summons and the defendants' insistence herein that such a decision is binding and would disentitle the plaintiff from disposing of the said property, the borrower and/or the defendants themselves have voluntarily disposed of or agreed to the disposal of other properties held as security for the facility towards settlement of their indebtedness to the plaintiff. In fact, in the course of making its periodic payments to AMBB and/or the plaintiff, the borrower has made payment specially towards settlement of the outstanding interest under the overdraft facility.

[16] In requesting the plaintiff to take over its indebtedness from AMBB, the borrower made the representation that it would settle its indebtedness, both principal and interest, and is deemed to have conceded and agreed to be subject to the plaintiff's statutory rights and powers. In making partial payments to AMBB and to the plaintiff towards settlement of its indebtedness even after the decision in the originating summons, the borrower has perpetuated in the eyes of both AMBB and the plaintiff, its acquiescence to the quantum of its indebtedness which includes both the principal and the interest sums. By its voluntary disposal of the other two secured properties, the borrower has held out that both AMBB and the plaintiff are entitled to dispose off secured properties in partial settlement of the indebtedness without qualification. Given these clear avowals by the borrower, it flies in the face of equity and good faith for the defendants or the borrower to now attempt to use the allegation of wrongful interest as a shield from the consequences of their own actions.

[17] The following factors are equally relevant and must be mentioned:

(a) The disposition of the said property is not, and cannot be, an issue here. The sale of the said property has occurred and it was conducted under s 57 of the Act. That section enacts as follows:

57. Entitlement to dispose assets by private treaty.

(1) Notwithstanding any other law and in addition to any other power the Corporation may have under any contract or any other law, the Corporation or the acquiree as holder of any security, whether as chargee, mortgagee, assignee, lien-holder or otherwise, over any property shall be entitled —

(a) to dispose of such property or any part of such property by way of private treaty; and

(b) where such property consists of land, to take all steps as it deems fit to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land (whether by itself or by any person authorised by it) to inspect, protect, secure, maintain or repair the land.

(2) A sale by private treaty under subsection (1) may be effected by private contract, auction, tender or any other mode of sale.

(3) For the purposes of subsection (1), the Corporation or the acquiree shall be deemed to be authorised by the grantor of the security to effect the transfer of ownership of the property to the purchaser.

(4) Every Registrar of the High Court, the Registrar of Companies, the Registrar of land, the Registrar General of Ships, a central depository, an authorised depository agent, and any person maintaining a register or record of ownership or interest, as the case may be, shall accept a transfer certificate or an instrument of transfer or other registration document executed by the Corporation or the acquiree and effect the transfer of the property or any part of the property to the purchaser without the need for any further application or filing of any further documents.

(5) Notwithstanding anything to the contrary in any law, the Corporation or any related company or subsidiary of the Corporation may, without having to pay any deposit, acquire any property disposed of under subsection (1) and be entitled to set off the purchase price against the liability owed to any one or more of the following:

(a) the Corporation;

(b) any related company of the Corporation;

(c) any subsidiary of the Corporation.

(6) Corporation's rights under subsection (1)

(a) may be exercised notwithstanding any order for sale made whether pursuant to any rules of the court, the National Land Code, the Land Ordinance of Sabah or the Land Code of Sarawak or any other law and notwithstanding any step or proceedings taken or pending to sell the property;

(b) may be exercised without the need for any approval, confirmation or order of court;

(c) are cumulative and not exclusive of any other right or remedy provided by law or contract;

(d) may be exercised concurrently with any right or remedy provided by law or contract.

(7) For the purpose of this section, 'related company' has the meaning assigned to it by the Companies Act 1965. A

The applicability of s 57 of the Act to the facts of this case cannot be doubted. The following summary would suffice to show its relevance:

(i) Once the plaintiff's entitlement as a chargee is established, it may sell the charged property by private treaty or by way of a contract. In this case, the first legal charge and the second legal charge as well as the vesting of the rights, title and interest in the plaintiff is not disputed. B

(ii) The actual approval or consent of the chargor to such a sale is unnecessary by virtue of the deeming provision in s 57(3) of the Act. That being the case, the objections of the chargor to the sale after the fact are similarly irrelevant. C

(iii) The technicalities and consequences of a sale by private treaty by the plaintiff, for example, the registration of a change of ownership and so on, require no further act or validation by the authorising bodies.

(iv) Similarly, there is no necessity to seek recognition or confirmation by a court of law in regard to the plaintiff's right to invoke its power to sell the said property by way of a private treaty. D

(v) Apropos of the facts of this case, and by virtue of s 57(6) of the Act, a private treaty sale under s 57 of the Act is not tainted, avertable or nullified by any proceedings or prior judgment of a court of law relating to the charged property or the liability of the chargor to the chargee. E

(vi) By virtue of the fact that the sale by private treaty under s 57 of the Act is not subject to court sanction or bound by prior court decisions or ongoing proceedings, it is the submission of the plaintiff that the plaintiff's right and power to invoke the said section of the said Act and the enforcement of a private treaty sale thereunder are not subject to the objections, disputes or challenges that the chargor or any third party may take in regard to the liability of the chargor or principal debtor to the plaintiff or in order to restrain the sale. F

(vii) For the abovementioned reasons, the plaintiff contends that the sale of the said property to the purchaser is regular and has taken effect. It is submitted that the action before this court is merely for vacant possession pursuant to the sale. Given the facts as narrated earlier, it is not open to the defendants to challenge the sale at this stage or in these proceedings. G

[18] At this juncture, the plaintiff wishes to advance a salient point. It is this. It is not the plaintiff's stand that the plaintiff's acts are inviolable. The plaintiff's exercise of its powers to sell charged property may be subject to challenge. But, such a challenge if mounted is limited by the scope and breadth of the plaintiff's powers under the Act. Indeed the sale by private treaty and the invocation of s 57 of the Act cannot and ought not be the subject of judicial restraint or curtailment otherwise it would make a mockery of the intent and purpose of ss 57 and 72 of the Act. Consequently, questions pertaining to the validity or regularity of the sale ought not to affect the proceedings hereunder for vacant possession. H I

[19] It must, however, be emphasised that the right of the defendants or any aggrieved party for that matter to seek recourse is enshrined in and within the Act itself. Section 15 of the Act preserves the defendants' right to seek recourse against the original tender – in this case AMBB, for any perceived wrong doing or infringement of its rights. But the section limits the right of recovery even where an equitable interest in an asset is concerned, to monetary relief. And if the defendants are able to show (which is not applicable here) that they have a 'disclosed claim' against the plaintiff within the meaning of the Act then they may have recourse against the plaintiff and by virtue of ss 14(4) (1), 57(3) and 57(6) of the Act their remedies are restricted to monetary relief.

[20] It is on the basis of the matters stated above that the plaintiff maintains that the issues raised by the defendants as challenges to this action for vacant possession, namely, the allegations that the borrower is not liable to the plaintiff, that AMBB had breached the terms relating to the overdraft facility, that the claim is premature, that the procedure of the sale itself is flawed and that the said property was sold at an under value are not matters to be taken into consideration in this action. These matters ought to be appropriately brought as claims against AMBB or (if a disclosed claim or other legal duty on the plaintiff can be shown) raised against the plaintiff in separate proceedings. And even in such proceedings, the defendants' relief is limited to damages. It cannot, by virtue of ss 57 and 72 of the Act, restrain the sale or seek specific performance.

[21] It is the plaintiff's submission that the defendants have no defence to this action. Now, given the fact that there has been a sale of the said property conducted under and by virtue of the provisions of s 57 of the Act and the fact that the defendants have failed to deliver up vacant possession of the said property despite due notice to quit, it would certainly be an appropriate submission for the plaintiff to make. The disposition of the said property is no longer an issue here. The sale of the said property has been done. It is not possible, at this juncture, for the defendants to challenge a sale under ss 57 of the Act or to try to restrain or invalidate it or even to try to restrain the plaintiff's application for vacant possession of the said property. The defendants' remedy for any impropriety in the sale of the said property, which the plaintiff denies, lies in damages only, and such a claim for damages is separate from, and certainly cannot bar, the present application for vacant possession.

[22] I pause here for a moment and I have this to say. The plaintiff's application in encl 8 and the supporting affidavit in encl 7 seem to suggest that the plaintiff's application for summary judgment is based on O 14 of the RHC even though the plaintiff has by omission or otherwise not specifically pleaded the aforesaid provision of the RHC in its application. Thus, it is necessary to reproduce O 14 r 3(1) of the RHC which reads as follows:

> 3. Judgment for plaintiff (O 14 r 3)
>
> (1) Unless on the hearing of an application under r 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that

claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

[23] In the course of dispensing justice, the courts have addressed various situations and circumstances governing O 14 r 3(1) of the RHC. For the basic principles as to what would amount to an issue or question in dispute which ought to be tried – meaning a triable issue, reference to the case of *Hong Leong Finance Berhad v Rextex Rubber Products (M) Sdn Bhd & Anor* [1996] 4 CLJ 580 should be made. At p 583 of the report, the court had this to say:

It is now well known that the purpose and object of an O 14 of the Rules of the High Court, 1980 (RHC) is to enable the plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue which ought to be tried: *Roberts v Plant* [1985] 1 QB 597. The Privy Council in *Jones v Stone* [1894] AC 122 considered summary judgment:

> … to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay.

A triable issue may be established by showing that there is a defence to the claim, a dispute on the facts (*Saw v Hakim* [1889] 5 TLR 72), or that a point of law requires determination (*The Electric and General Contract Corporation v The Thomson – Houston Electric Company* [1895] 10 TLR 103; *Cow v Casey* [1949] 1 KB 474). The House of Lords in *Jacobs v Booth's Distillery* [1901] 85 LT 262 established that the Court's role at the hearing of an application for summary judgment is not to delve into the merits of the issues raised by the defendant. The court is supposed to determine whether an issue has been raised, it is not for the court to consider whether the defendant is likely to succeed or fail. Bramwell LJ in *Thompson v Marshall* [1880] 41 LT 720 tersely said that O 14 was:

> … intended to apply to clearly undefended causes, and to prevent defendants from putting in statements of defence for the purpose of delay where there could be no defence on the merits. Here the Judge had a doubt as to whether there might be a defence or not, and therefore this is not a case for judgment in a summary manner.

Back home in the country, Gopal Sri Ram JCA in *Ng Hee Thoong Anor v Public Bank Bhd* [1995] 1 MLJ 281 succinctly observed:

> The effect of O 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no bona fide triable issues.

[24] And with regard to the famous phrase there ought for some other reason to be a trial, reference to the case of *Kiwi Brands (Malaysia) Sdn Bhd v Multiview Enterprises Sdn Bhd* [1998] 6 MLJ 38 must be made. There at p 44 of the report, the court had this to say:

The phrase 'there ought for some other reason to be a trial' was inserted in O 14 r 3(1) of the RHC to bring and ensure that justice is done to all parties. Megarry J in *Miles v Bull* [1968] 3 ALL ER 632 especially at p 637 of the report had this to say of that phrase:

> These last words seem to me to be very wide. They also seem to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff.

In *Concentrate Engineering Pte Ltd v United Malayan Banking Corp Bhd* [1990] 3 MLJ 1, the court there held that the circumstances and audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiffs constitute 'some other reason' for a trial in terms of O 14 r 3(1).

Richard Talalla J in *Overseas-Chinese Banking Corporation Limited v Banhenly Holdings Sdn Bhd & 7 Ors* [1993] 2 CLJ 347, 350 remarked:

> As I see it O 14 r 3(1) of the Rules of the High Court provides for leave to defend to be given in the application for summary judgment where there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial. I have in mind the case (of) *Miles v Bull* [1969] 1 QB 258 where Megarry J. said in regard to the last words of the sub-rule that they seemed to him to be very wide and to have special significance where, as in that case, most or all of the relevant facts were under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which would aid the defendant.

So much for the law.

[25] According to the defendants, they have raised issues or questions in dispute which ought to be tried or that there ought for some other reason to be a trial in respect of the plaintiff's claim. Have the defendants succeeded in doing so? I would answer it in the negative.

[26] The plaintiff was incorporated under the Act. The purpose and intent of the incorporation of the plaintiff can be seen in the preamble to the Act which states as follows:

> An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the Corporation and for matters connected therewith or incidental thereto.
>
> [1.9.1998 – PU(B)333/1998]
>
> WHEREAS special provisions are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises and to promote the revitalisation of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities:

AND WHEREAS legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good:

AND WHEREAS legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets or liabilities have been so acquired.

[27] Augustine Paul JCA writing for the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 made the following observations at p 286 of the report:

Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximize recovery values. The appellant was thus given three principal duties. They are:

(a) acquisition of non-performing loans and assets;

(b) management of such assets, including by way of the appointment of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors; and

(c) disposition of the acquired assets.

In order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facilities by way of statutory vesting; to manage the affairs of corporate borrowers through Special Administrators appointed to formulate Work-out Plans in order to repay debts owing to creditors, and finally to dispose of charged assets.

[28] Now, the plaintiff in the course of exercising its statutory powers duly acquired the borrower's loan and all securities under the loan from AMBB on 29 December 1999. It cannot be overstated that the powers which have been granted to the plaintiff under the Act with regard to all the rights, title and interests vested in the plaintiff are almost all encompassing and in the instances when the exercise by the plaintiff of its powers under any of the provisions of the Act has been challenged, the courts have been quick to strike down such challenges that were put forth. Knowing fully well that the defendants are going on an uphill task, the defendants posed this salient question: what is it that makes the present set of facts and circumstances before this court different from the previous challenges to the plaintiff's exercise of its powers under the Act?

[29] According to the defendants, the borrower's loan that was acquired by the plaintiff from AMBB was tainted at the outset. Further, according to the defendants, AMBB had during the subsistence of the loan imposed interests on the borrower's loan without conforming to the terms of the loan agreements executed between the borrower and AMBB. This, according to the defendants, gave rise to the imposition of the 'wrongful interest'. Heavy reliance was placed by the defendants on the decision in the originating summons as alluded to earlier. That decision appears to

be the axis upon which the defendants defence turns. With respect, I must categorically state that the decision in the originating summons must be read within the confines of the application that was before that court. Passages in the judgment of the learned Judge in regard to the decision in the originating summons were referred to by the defendants. Out of deference to the defendants, I will now refer to those passages. After considering the expert oral testimony of Tan Keat Lin, the manager of the Regulations Department of Bank Negara Malaysia, the learned Judge wrote:

> (2) Can The Plaintiff Claim Interest Not Provided For Expressly Or Impliedly In The Facility Agreement
>
> The loan agreements show clearly that the term or condition in respect of both the loan facilities granted by the plaintiff to the 1st defendant imposed interests which were calculated on the Scheme of Interest according to the BLR. I find that the plaintiff had acted unilaterally when it varied the Scheme of Interest on the said loan facilities without first obtaining the prior consent of the defendants, contrary to the executed loan agreements. The plaintiff had varied from the Scheme of Interest based on the BLR to the Scheme of Interest based on cost of funds.

Continuing, the learned judge said:

> Whilst I agree that the plaintiff has the absolute discretion to vary the rate of interest, such discretion is only limited to varying the rates of the interest as provided under the prescribed rate of the existing facility agreements which is the scheme of interest based on the BLR. The plaintiff had no right to vary the scheme of interest as a whole from BLR to cost of funds because both the schemes of interest are two distinct forms of interest which are calculated on different formulae. I accept the evidence of the expert from Bank Negara who stated that the rate of BLR is calculated with reference to a ceiling set by Bank Negara Malaysia which in term is calculated by reference to a formula which has been presented by Bank Negara Malaysia. In so far as the scheme of interest of the cost of funds is concerned he emphasised that there was a requirement of a condition that there ought to be a reference to a specified source of funds which the bank can actually identify as the source from which it has been funding the loan. Once this has been shown, then there is no formula prescribed by Bank Negara for the bank to calculate what is its cost of funds. He even agreed that a bank could not on its own change from the BLR rate of interest to the cost of funds scheme of interest. I cannot ignore the fact that the BLR scheme of interest is absolutely controlled by Bank Negara whilst the cost of funds scheme of interest is completely at the discretion of the bank.
>
> To my mind, this is clearly the type of situation envisaged by the Federal Court in *Low Lee Lian* in its third category of showing 'cause to the contrary'. I am satisfied that the defendant has shown that by arbitrarily changing the scheme of interest, the plaintiff has acted contrary to both law and equity.

Further down, the learned judge had this to say:

> However, in the present case since the calculation of interest is based on a totally different scheme of interest, contrary to that agreed upon by the parties, no rectification can be made. The plaintiff had crossed the Rubicon, so to speak. It is clearly unconscionable of the plaintiff to have agreed on one scheme for calculating the interest and later abandoning the same without reason or explanation and resorting to another totally different scheme for calculating the interest, unenvisaged by the parties from the outset. This to my mind falls in line with what was expressed by the Federal Court in *Low Lee Lian* at p 86:

> … He (the chargor) may, by establishing such an obligation of conscience, rely upon it to thwart an application under s 256 of the Code.

> As to whether there has been any breach of a law, suffice it for me to consider the evidence of the Bank Negara expert that a bank cannot resort to the scheme of interest based on cost of funds without first having identified the source of funds and that therefore since the source of the fund for the granting of the loan could well and truly have been identified from the outset, the plaintiff ought to have clearly stated in the loan agreement that it was relying on the cost of funds scheme of interest. This is not a case of a demand of an erroneous sum; this is a case of a wrongful demand. Such a demand renders the Form 16D Notice and the notice of demand ineffectual and thus invalid.

[30] It is now ideal for me to make the following observations in regard to the decision in the originating summons:

(a) The court there was imbued with distinct and finite powers of determination in an application for an order for sale. Simply put, the court was required to make a finding on whether or not there is a cause to the contrary under the National Land Code 1965 ('NLC').

(b) A finding of a 'cause to the contrary' is not a finding or judgment against the plaintiff that disentitles it from further pursuing its remedies as a chargee. It is merely a finding that the plaintiff had failed to comply with or satisfy the provisions of the NLC for an order for sale of the charged property.

(c) The decision in the originating summons by the learned Judge was not and could not be any more or any less than a finding that the alleged change to the scheme of interest was a cause to the contrary and not an adjudication or final determination of any substantive issue between the plaintiff and the first defendant.

(d) It must be emphasised that the issue of cause to the contrary does not arise in this case because the plaintiff did not conduct the sale of the said property under an NLC order for sale.

[31] With regard to the defendants' contention that the decision in the originating summons, pertaining to the issues of the variation of the scheme of interest and the invalidity of the demands issued by AMBB, is conclusive and binding upon the parties and upon this court, I respectfully beg to disagree. A decision in an order for sale proceedings does not bind the parties nor this court. It is a decision not based on the merits of the case. In determining proceedings under an order for sale, the court is not empowered to make any findings of fact. Gopal Sri Ram JCA in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, writing for the Supreme Court, laid down the following guidelines for the Judges to follow and at p 88 of the report, this was what his Lordship said:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he

must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

Continuing on the same page, his Lordship had this to say:

> On no account should he express any view on the merits of any or all of the points taken by the chargor, save to say whether, having regard to the three narrow categories we have laid down in this judgment and the relevant authorities upon each category, cause to the contrary has been established to his satisfaction. This is because, for reasons which will appear in a moment, any view expressed by a Judge on the general merits of the points taken by the chargor will be purely academic.

Again, further down on the same page and in serious vein, his Lordship aptly said:

> Although each case turns upon its own facts, we propose to consider, by way of illustration only, the usual kind of case with which this court has been faced on numerous occasions. An application under s 256 is opposed by the chargor on the ground that the chargee has acted in breach of contract, eg, by not releasing moneys due under the loan agreement or by increasing the rate of interest without proper notice or by not giving any proper account of the sums paid by the borrower. A judge faced with such complaints will merely say that they do not, on a proper reading of s 256(3) and the authorities which have considered the section, constitute cause to the contrary. He will not, and ought not to, enter upon a discussion of the question whether any or all of these complaints have or are devoid of any merit. Much confusion and difficulty has been occasioned in this area of the law by a failure on the part of those concerned with the task of dealing with applications under s 256 to properly appreciate their true role assigned them by Parliament.
>
> We have said that s 256(3) must be read narrowly. It does not, however, follow from this that the chargor who is unable to satisfy the Court of cause to the contrary is left without any remedy whatsoever. Allegations that fail to amount to cause to the contrary may, as observed earlier, nevertheless form the basis of an action in personam against the chargee.

Proceeding ahead, his Lordship continued at pp 89 to 90 of the report:

> But that does not bring the matter to an end. It is open to the appellant to bring an action in personam for breach of contract against the respondent based upon the first and second grounds of complaint advanced by counsel during argument, subject to the proof of any alleged breach as well as any defences that may be fairly available to the chargee, including the plea of limitation. However, it is no answer for the respondent to say that the appellant's claim is barred by issue estoppel or *res judicata*.
>
> A Judge who makes an order for sale merely finds that the facts relied upon by the chargor to resist the chargee's application do not constitute cause to the contrary. He is unconcerned with the issue whether the same facts are sufficient to support an action in personam that may be brought by the chargor against the chargee. There is thus no determination of an issue or a cause for an estoppel to operate against the chargor's action.
>
> Further, an order for sale made pursuant to s 256 of the Code is not a judgment. That was settled by the decision of the Supreme Court in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257, where Seah SCJ speaking of an order for sale said (at p 258):
>
> > Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the

> provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge. (Emphasis added).

His Lordship in that case drew support for his view from the judgment of Ong CJ (Malaya) in *American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95.

In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court affirmed this principle and held that the making of an order for sale upon the failure of a chargor to satisfy the court that there existed cause to the contrary did not bar a subsequent action in personam brought by the chargor based upon the same facts that did not avail him in opposing the application under s 256. Eusoff Chin SCJ (as his Lordship the Chief Justice then was) set out the relevant law in the following terms:

The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our Courts which have correctly stated the law upon the subject. In *VRKRS Chettiappah Chetty v Raja Abdul Rashid Ibni Almarhum Sultan Idris* [1933] MLJ 18, the appellant (chargee) had taken a summons under s 149 of the Land Code 1926 for an order of sale of the charged premises. The respondent pleaded that he could not be sued because there was an Order in Council dated 8 January 1888 which stated:

> No Member of the Royal Family of Perak (Waris Negri) is liable to be sued for debt in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident. (Emphasis added)

Apparently no permission had been obtained as required by the Order in Council. Thorne Ag CJ in the Court of Appeal held [at p 19]:

> It is to be noted that the legislature in its wisdom has provided that the chargee may not exercise his rights against the charged lands without first establishing that defauld had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
>
> … I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt', but he applies for leave to exercise his rights as a chargee. The proceedings result not in a judgment or decree, but in making or refusal of an order of sale. (Emphasis added).

That decision was followed in *Murugappa Chettiar v Lechumanan Chettiar* [1939] MLJ 296, *Mercantile Bank of India v TF Egan & Anor* [1940] MLJ 288 and *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257.

A It is equally settled law that in order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree; 16 *Halsbury's Laws of England* (4th Ed) para 1519. This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

B In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's C action.

For our part, we would affirm what has been said in the foregoing passage as accurately representing the law upon the subject. It will be seen that the Supreme Court in Kandiah was not establishing any new proposition but merely applying earlier pronouncements. The judgment of the Supreme Court ought therefore to give rise to no difficulty. Yet, it D would appear the decision has not been properly appreciated.

[32] In *Malaysia Credit Finance Bhd v Yap Hock Choon & Anor* [1989] 2 MLJ 363, the late Peh Swee Chin J (as he then was) held that:

E the remedy of claiming possession by the chargee and the right to apply for an order of sale by public auction are not mutually exclusive (see p 364 of the report).

[33] It is appropriate to mention that the issue of 'wrongful interest' is currently an issue before the Kuala Lumpur High Court vide civil suit no D6–22–3673 of 1998 F ('D6 suit') where the plaintiff is suing, inter alia, the borrower for recovery of the outstanding amounts under the overdraft facility. Thus, the entire limb of the defendants' defence in this suit relating to any alleged 'wrongful interest' is not only irrelevant to these proceedings but it should also not be adjudicated in this suit because it gives rise to duplicity of proceedings with the D6 suit. Furthermore, the question as to whether AMBB had charged 'wrongful interest' on the overdraft G facility to the borrower's determent is a matter that is between AMBB and the borrower. It has been specifically provided under s 15 of the Act that it is the original lender (AMBB) from whom the borrower should seek recompense for any breach by AMBB of its obligations that occurred prior to the vesting.

H **[34]** There is another fact which should be highlighted. It is this. That in the decision in the originating summons AMBB had applied for orders for sale of all the three properties held as security for the facility. Out of the three properties, two were sold after the decision in the originating summons by sales procured by the defendants/borrower themselves. The third property which is the said property is the I subject matter of this suit. Contradictions arise between the sale of the two properties and the defendants' allegations in this suit. Here, the defendants preach the sanctity of the decision in the originating summons as disqualifying the sale of the said property and, as a consequence, the plaintiff's right to vacant possession on the basis

that the court in the originating summons had found that there exists a claim for 'wrongful interest' by AMBB. However, no such 'wrongful interest' claim appeared to deter, or hesitate or give pause to or stay the defendants/borrower when it facilitated the sale of the other two properties in December 1999 and May 2001.

[35] In assessing the accuracy of the factual account, I have this to say. After the decision in the originating summons, AMBB filed an appeal dated 9 December 1999 to the Court of Appeal. The borrower then requested that its indebtedness to AMBB be taken over by or vested with the plaintiff to enable it to repay its debt. No mention was made of removing the alleged 'wrongful interest' or that by reason of the decision in the originating summons the borrower would not pay or settle the interest levied on the overdraft facility by AMBB or that the plaintiff's prospective right to claim the interest on the overdraft facility would be affected thereby. Consequently, the plaintiff elected to withdraw the appeal to the Court of Appeal vide the 'Notis Penarikan Balik Rayuan' dated 6 March 2000. Why was this so? The answer can be seen in the defendants' defence. It is because the borrower/the defendants had elected to settle the indebtedness to the plaintiff. The borrower sold one out of the three properties secured for the overdraft facility, that had been part of the subject matter of the originating summons, towards partial settlement of its indebtedness. The borrower also made progressive payments towards the settlement of the indebtedness and subsequently entered into arrangements to sell the second out of the three properties secured for the overdraft facility.

[36] Sometime in the month of September 2002, the plaintiff put up the said property for sale under its seventh tender exercise. I take cognizance of the fact that the defendants did not raise any objections to the tender of the said property under the seventh or subsequently the eighth tender exercises nor did the defendants file any court action to restrain the same. In fact, the defendants failed to adopt and pursue any measure to dispute the sale of the said property until after the private treaty sale to the purchaser was executed and the plaintiff then filed this action for vacant possession.

[37] In the light of the foregoing facts, there was no need for the plaintiff to 'rectify' the situation of the 'wrongful interest' when the borrower/defendants had so clearly agreed to settle the indebtedness in increments and by the sale of the secured properties without demur as to the quantum of indebtedness or the interest levied.

[38] The defendants accused the plaintiff of perpetrating a 'cover up' of AMBB's wrongful variation of the scheme of interest by 'wrongfully' varying the interest rate of the overdraft facility under the provisions of s 14(4)(m) of the Act. The veracity of the defendants' accusations can be challenged in a number of ways. There has been no factual or effectual variation of the interest rate. It must be borne in mind that:

(a) the interest rate prescribed in the overdraft facility agreement dated 15 July 1995 is 2% per annum above the Base Lending Rate ('BLR');

(b) the interest rate prescribed in the overdraft facility agreement dated 21 May 1996 (when the overdraft facility was increased) is 2.5% per annum above BLR; and

(c) the rate of interest charged by the plaintiff since the date of vesting of the indebtedness is 2% per annum above BLR as stated in the notice of acquisition dated 2 February 2000 issued by the plaintiff to the borrower.

[39] It can be surmised that the interest rate charged by the plaintiff is the same as that prescribed under the first facility agreement. The only difference now is that the plaintiff follows the BLR fixed by Malayan Banking Berhad and not that of AMBB. It must be emphasised that the defendants and the borrower have never disputed or challenged the rate of BLR charged on the facility. The defendants would, if they so wished, advance the argument that the rate of interest under the second or later facility agreement which was at the higher rate of 2.5% per annum above BLR was the agreed rate of interest at the time of vesting. The interest rate charged by the plaintiff at 2% per annum above BLR is lower than that prescribed in the later facility agreement. There is clearly no detriment to the borrower if a lower rate than that prescribed in the facility agreement is levied on the overdraft facility.

[40] Based on the aforesaid scenario, the following observations must be made:

[41] It is argued that there was no agreement as to the rate of interest levied by the plaintiff in regard to the overdraft facility. This argument, to say the least, is erroneous and it goes against the grain of the undisputed facts and the contemporaneous documents. As I said earlier the plaintiff took over the indebtedness under the overdraft facility from AMBB at the borrower's request. And thereupon, as I said earlier, the plaintiff issued a notice of acquisition dated 2 February 2000 to the borrower setting out, inter alia, the interest rate to be levied on the overdraft facility from 29 December 1999. It must be recalled that the borrower did not, in writing or otherwise, dispute the rate of interest stipulated in the notice of acquisition. This meant that the borrower accepted the rate of interest. To confound the matter further, the borrower continued to make partial payments towards the settlement of the indebtedness.

(a) the allegation that the plaintiff had abandoned the interest rates provided in the overdraft facility agreements is untrue;

(b) the allegation that the borrower did not agree with the interest rate levied is similarly untrue;

(c) the imputation that the plaintiff has in any way acted outside the provisions of s 14(4)(m) of the Act is also untrue for the following reasons:

(i) s 14(4)(m) of the Act comes into operation where the interest rate under the overdraft facility agreement is based on cost of funds or BLR or where the interest rate is no longer determinable under the overdraft facility agreement;

(ii) here, in this case, the operation of s 14(4)(m) of the Act comes into play because of the terms relating to interest in the overdraft facility agreement;

(iii) given the situation that s 14(4)(m) of the Act applies in this case, the interest rate chargeable under the overdraft facility falls under either s 14(4)(m) (i) of the Act or s 14(4)(m)(ii) of the Act;

(iv) here, in this case, the interest rate charged by the plaintiff falls under either or both sub-sections (i) and (ii) of s 14(4)(m) of the Act.

[42] Reverting back to the decision in the originating summons, the defendants pose this question: what steps did the plaintiff take to rectify the situation in the face of the final decision of the High Court in that case – referring to the decision in the originating summons, which found that the loan that was granted by AMBB to the borrower was tainted with wrongful interest. According to the defendants, the answer is a very emphatic 'Nothing'. Here was, according to the defendants, a corporation endowed with powers beyond that which any body incorporated by the government prior to this in the history of Malaysia had ever possessed and the plaintiff elected to do nothing to rectify the situation. According to the defendants, in the exercise of its almighty powers bestowed upon it by Parliament to administer and manage persons whose assets or liabilities have been so acquired, the plaintiff could have thought of exercising a number of options, like for instance:

(a) remove the wrongful interests which were imposed upon the borrower's loan by AMBB, if calculable; or

(b) reduce the interest imposed upon the borrower's loan by AMBB, if the wrongful interests were no longer calculable, and seek the agreement of the borrower as to the acceptable final sum payable by the borrower; or at the very least;

(c) conduct some form of negotiation with the borrower to resolve the issue.

[43] According to the defendants, the plaintiff was unfazed by the decision in the originating summons and none of the events as envisaged above ever transpired between the plaintiff and the borrower nor was it to be forthcoming and the borrower's tainted outstanding loan as at the date that the plaintiff acquired the loan from AMBB still stood. Subsequently, the plaintiff made a decision to implement an alternative strategy to overcome the problem of the calculation of interests charged upon the borrower's loan by AMBB. The plaintiff opted to exercise its rights as provided for under s 14(4)(m) of the Act and relying specifically on that section the plaintiff unilaterally revised the interest rate charged on the borrower's loan to be calculated by reference to Malayan Banking Berhad's BLR.

[44] According to the defendants, the interest rates as already provided for in the said loan agreements are clear and obvious and it reads as follows:

(i) The Schedule to the Loan Agreement between AMBB and the borrower dated 15 July 1995 at the portion of the prescribed rate states as follows:

> Two point zero per centum (2.0%) per annum above the Bank's Base Lending Rate calculated on daily basis.

(ii) Clause 1 of the Facility Agreement dated 21 May 1996 under the heading of Definitions and Interpretation states as follows:

> Margin: 2.5% (two point five per centum) per annum.

A Prescribed rate: the Margin above the BLR on daily rest or such other rate as may be stipulated by the Bank from time to time and at any time pursuant to this Facility Agreement.

B **[45]** The plaintiff had taken steps to abandon the interest rates as provided for in the loan agreements between the borrower and AMBB solely with the purpose of avoiding the breach of the loan agreement between AMBB and the borrower as was committed by AMBB and as decided by the decision in the origination summons. According to the defendants, what the plaintiff did was unfair, inequitable and did not take into consideration the interests of the borrower and/or the first defendant C and it infringed the fundamental rights of the borrower and the first defendant as contained in art 8(1) of the Federal Constitution.

[46] Article 8(1) of the Federal Constitution speaks of the right of a citizen. It is worded in this way:

D 8. Equality

(1) All persons are equal before the law and entitled to the equal protection of the law.

[47] I need to refer to two textbooks that would assist me. The first is a book E written by KV Padmanabha Rau entitled *Federal Constitution of Malaysia – A Commentary*. There at pp 64 to 65, the learned author wrote:

The doctrine of equality is an old concept. Many of the written constitutions in the democratic world do assure the right in their two facets, equality before the law and equal protection of the laws, howsoever differently stated. The concept combines the old English F doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'.

And further down the same page, the learned author had this to say:

Thus, art 8(1) of the Federal Constitution of Malaysia also gives expression to the doctrine G of the rule of law and equal protection of the laws, which however over the years have come to be understood in more different ways than a plain reading of the words convey. The State's right to make classifications has for long been recognised through judicial decisions. In short, it should naturally be the duty of the State to mete out treatment unequally or to discriminate, if not doing so would result in denial of equality before the law or equal protection of the laws. In simple words, the Article assuring equality is no H charter for treating the unequals alike or the equals unequally. Ironically thus, the doctrine of equality can mostly survive only by resting on classifications validly made. Article 8 also combines the assurance of equality and protective discrimination in all matters in the manner listed and also to the extent expressly authorised by the Constitution.

I **[48]** The second textbook is written by HM Seervai entitled *Constitutional Law of India, A Critical Commentary*, 3rd Ed, vol 1. Article 14 of the Indian Constitution is almost equivalent to our art 8(1) of the Federal Constitution and the learned author had this to say at p 279:

Article 14 confers a right by enacting a prohibition which in form, at least, is absolute.

Continuing on the same page and spilling over to p 280, the learned author wrote:

> In this respect, art 14 has been said to differ from art 19. 'It will be observed that, so far as (art 14) is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other articles, eg, art 19, cll (2) to (6).' But, these observations, though formally correct, overlook the fact that art 14 is not really absolute, since the doctrine of classification has been incorporated in it by judicial decisions. Article 14, as interpreted by the courts, would run in some such words as these: The State shall not deny to any person equality before the law or equal protection of the laws provided that nothing herein contained shall prevent the State from making a law based on or involving a classification founded on an intellible differentia having a rational relation to the object sought to be achieved by the law.

Earlier on, the learned author made reference to the case of *Ajay Hasia v Khalid Mujib* ('81) ASC 487, and this was what the learned author wrote (see p 273):

> The true scope and ambit of art 14 has been the subject matter of numerous decisions… It is sufficient to state that the content and reach of art 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of the evolution of our constitutional law, art 14 came to be identified with the doctrine of classification because the view taken was that art forbids discrimination and there would be no discrimination where classification making the differentia (sic) fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in *EP Royappa v State of Tamil Nadu* [1974] 2 SCR 348 that this Court laid bare a new dimension of art 14 and pointed out that that Article has highly activist magnitude and it embodies a guarantee against arbitrariness … We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of art 14, and if it affects any matter relating to public employment, it is also violative of art 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.
>
> Now … (as to) the requirement of art 14; what is the content and reach of the great equalising principle enunciated in this article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits … Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades art 14 like a brooding omnipresence. This was again reiterated by this court in *International Airport Authority*'s Case [1979] 3 SCR 1014 … It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the Courts is not paraphrase of art 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in

question is arbitrary and therefore constituting denial of equality. If the classification is not reasonable and does not satisfy the two conditions referred to above, the impugned legislative or executive action would plainly be arbitrary and the guarantee of equality under art 14 would be breached.

[49] Based on the above propositions, it can be surmised that art 8(1) of the Federal Constitution does not confer an absolute right to a citizen but merely grants to the citizen a qualified right.

[50] The Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* had the opportunity to examine the constitutionality of s 72 of the Act in the context of art 8(1) of the Federal Constitution. And s 72 of the Act is worded in this manner:

> 72. Limits on the grant of orders of court.
>
> Notwithstanding any law, an order of a court cannot be granted —
>
> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act.
>
> and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

And Augustine Paul JCA writing for the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*, aptly said (see pp 286–287 of the report):

> Bearing in mind the object of the Act the constitutionality of s. 72 must be viewed with greater latitude as explained in *RK Garg v Union of India* AIR [1981] SC 2138. Such an approach is reflected in *Charanjit Lal Chowdhury v Union of India* AIR [1951] SC 51 where a law passed even against a single company in regard to the administration and management of its affairs was held not to violate art 14 (our art 8(1)). As Mukherjee J said at p 59:
>
> > We should bear in mind that a corporation, which is engaged in production of a commodity vitally essential to the community, has a social character of its own and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone and in the interest of the community at large.
>
> As the Act itself indicates its object in the preamble and the basis of the classification is evident from the language of s 72 it falls within the first category as classified in *Shri Ram Krishna Dalmia & Others v Shri Justice S R Tendolkar & Others* AIR [1958] SC 538. It is clear that the Act was required in the public interest to promote the revitalisation of the nation's economy. Denial of injunctive relief is absolutely necessary to ensure that the object of the Act is not frustrated. That clearly is the purpose of s 72 which applies to all persons in the

same position as the respondent. Thus it applies equally to all persons who are similarly circumstanced. This is a reference to all persons whose assets and liabilities have been acquired by the appellant pursuant to the Act. Surely it cannot include the appellant itself for reasons which are too plain to state. Yet the Court of Appeal found that s 72 contravenes art 8(1) '… because it denies the appellant an opportunity to protect his immovable property by means of a temporary injunction under any circumstances whilst not placing any fetter upon the power to grant the same relief in the respondent's favour.' The law that we have referred to thus far makes it clear beyond doubt that there will be a violation of art 8(1) only if a legislation does not apply to a person who is similarly circumstanced as the other persons in the classification — and not to someone like the appellant outside it. The conclusion of the Court of Appeal is therefore wholly unsustainable as it is a total deviation from the law regulating art 8(1). It is therefore our unanimous view that there is a rational basis between the classification in s 72 and its object in relation to the Act. Section 72 therefore satisfies the requirements of the reasonable classification test and is not unconstitutional. This makes it unnecessary for us to answer the second question.

[51] Flowing from the decision of the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*, the stand of the plaintiff is this. That all the provisions of the Act are deemed to be constitutional. The defendants disagreed and they say that such a contention is misconceived. According to the defendants in order to consider as to whether there has been a breach of art 8(1) of the Federal Constitution, the application and enforcement of the law sought to be impugned must be considered on its own special circumstances and facts. It must be recalled that Augustine Paul JCA writing for the Federal Court in Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd made reference to the case of *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* [1958] SC 538 SR where SR Das CJ identified five different categories wherein a law which comes up for consideration of its validity under art 14 of the Indian Constitution (equivalent to our art 8(1) of the Federal Constitution). There his Lordship SR Das CJ said (see pp 279–280 of the report in *Kekatong*'s case):

(1) A statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the tests, the court will uphold the validity of the law, as it did in *Chiranjitlal v Union of India* AIR [1951] SC 41, *State of Bombay v FN Balsra* AIR [1951] SC 318, *Kedar Nath Bajoria v State of West Bengal* AIR [1953] SC 404, *VM Syed Mohammad & Company v State of Andhra* AIR[1954] SC 314 and *Budhan Choudhry v State of Bihar* AIR [1955] SC 191.

(2) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked

discrimination, as it did in *Ameerunnissa Begum v Mahboob Begum* AIR [1953] SC 91 and *Ramprasad Narain Sahi v State of Bihar* AIR [1963] SC 215.

(3) A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law, as it did in *State of West Bengal v Anwar Ali Sarkar AIR* [1952] SC 75, *Dwarka Prasad v State of Uttar Pradesh AIR* [1954] SC 224 and *Dhirendra Kumar Mandal v. Superintendent and Remembrancer of Legal Affairs* [1955] AIR [1954] SC 424.

(4) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification; the court will uphold the law as constitutional, as in *Kathi Raning Rawat v The State of Saurashtra AIR* [1952] SC 123.

(5) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the Government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the Government in the matter of such selection or classification. If the Government in making the selection or classification does not proceed on or follow such policy or principle, it has been held in *Kathi Raning Rawat v The State of Saurashtra AIR* [1952] SC 123 that in such a case the executive action but not the statute should be condemned as unconstitutional.

[52] Now, the constitutionality of s 72 of the Act in the Court of Appeal case of *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 and the Federal Court case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* arose on the question of 'the right of access to justice'. It seems, at first blush, that s 72 of the Act is directly inconsistent with the right apparently guaranteed under art 8(1) of the Federal Constitution and that was the sole question that was addressed by the Court of Appeal and the Federal Court in its respective decisions. Augustine Paul JCA in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* in considering as to which of the five categories listed by SR Das CJ in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* where s 72 of the Act would fall under held as follows (see p 286 as was reproduced earlier):

> As the Act itself indicates its object in the preamble and the basis of the classification is evident from the language of s 72 it falls within the first category as classified in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* [1958] SC 538.

But, according to the defendants, the finding made in respect of s 72 of the Act cannot be similarly made in respect of the application of s 14(4)(m)(ii) of the Act as contended by the plaintiff. HM Seervai in his book entitled *Constitutional Law of India, A Critical Commentary*, 3rd Ed, vol 1, had this to say in regard to the five different categories listed by SR Das CJ in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* (see p 299 of the book):

> The five classes of cases mentioned by Das CJ fall into two broad classes. Classes (i) and (ii) deal with the theory of classification made by the statute itself. Classes (iii). (iv) and (v) deal with the conferment of discretionary power.

[53] It is the submission of the defendants that unlike the finding of the Federal Court in respect of s 72 of the Act in the case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*, s 14(4)(m)(i) of the Act is not a law which would fall within the first category as classified in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others*. According to the defendants, the language of s 14(4)(m) of the Act clearly shows the nature of the said law which speaks of a conferment of a discretionary power upon the plaintiff. A close examination of s 14(4)(m) of the Act is now necessary in order to ascertain the pith and depth of the discretionary power which has been conferred on the plaintiff. In order to gain a clearer picture as to the actual reaches of the said provision, it would be practical to examine the provision dissected into relevant portions with a useful commentary added in respect of the same. I shall do so now. Section 14(4) of the Act enacts as follows:

> 14. Vesting.
>
> (4) Without prejudice to subsection (1), (2) or (3) in relation to an asset vested in the Corporation

And the commentary would be as follows. That the language employed in this section generally provides that the application of this section shall have no limiting effect whatsoever in any manner the exercise by the plaintiff of the specific powers of the plaintiff as provided for in ss 14(1), 14(2) and 14(3) in relation to an asset vested in the plaintiff. Proceeding further, section 14(4)(m) of the Act enacts as follows:

> (m) where the interest rate under any agreement in respect of an asset acquired by the Corporation is to be determined by reference to the cost of funds or base lending rate of the seller or is an interest rate that is otherwise no longer determinable as provided in the agreement, the interest rate payable under such agreement shall be —
>
> (i) such interest rate as the Corporation may agree with the obligor of the agreement; or
>
> (ii) determined in the same manner provided in the agreement by reference to base lending rate of a licensed institution determined by the Central Bank.

And the commentary would be as follows. The first part of s 14(4)(m) of the Act is self-explanatory in the sense that it speaks of the interest rates in respect of any

agreements (in practice and reality, normally the loan agreements) which have been acquired by the plaintiff and which is to be determined by reference to the cost of funds or base lending rate of the seller (that is, the financial institution who gave the loan to the plaintiff). The second part of s 14(4)(m) of the Act speaks of interest rates in respect of the loan agreements which have been acquired by the plaintiff and which are now no longer determinable as provided in the agreement for any reason whatsoever. Subsections (i) and (ii) of s 14(4)(m) of the Act are the entailing portions of the law which confer a discretionary power to the plaintiff to adopt either of the above provisos, that is, either to conduct negotiations and agree with the obligor of the agreement on a specific interest rate to be imposed upon the loan or the plaintiff may unilaterally adopt an interest rate by reference to the base lending rate of a licensed institution determined by the Central Bank.

[54] It is the position taken by the defendants that under s 14(4)(m) of the Act, particularly, the use by the plaintiff of its discretionary power under s 14(4)(m)(ii) of the Act in the face of a challenge, as to its validity under art 8(1) of the Federal Constitution is a law which can only fall either within class (iii) or class (v) of the classification as listed by SR Das CJ in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others*. Class (iii) of the classification by SR Das CJ speaks of statutes which provide for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case, the court will strike down both the law as well as the executive action taken under such law. The defendants make a suggestion to illustrate a possible scenario which could take place in order to demonstrate the discrimination which is inherent in s 14(4)(m) of the Act. That illustration is phrased in this fashion. That in respect of all loans acquired by the plaintiff and the obligors under the said loans acquired by the plaintiff who represent to be persons similarly situate, the plaintiff has been granted an arbitrary and uncontrolled power to unilaterally impose interest rates irrespective of the loan agreements in its own accord only when it sees fit to do so and not generally across the board in respect of all obligors. Flowing from this illustration, the defendants say that it is conclusive that the discretionary power conferred upon the plaintiff by virtue of s 14(4)(m)(ii) of the Act is an arbitrary and uncontrolled power which enables the plaintiff to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. That being the case, the defendants say that the court must strike down both the law as well as the executive action taken under such law.

[55] Class (v) of the classification by SR Das CJ in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* speaks of statutes conferring discretionary power to the government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the government in the matter of such selection or classification. If the government in making the selection or classification does not proceed on or follow such policy or principle, it has been held that in such a case the executive action but not the statute that should be condemned as unconstitutional. Interestingly, the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the plaintiff in the matter of such

selection or classification can be found in the preamble to the Act and as propounded by the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*. It is the submission of the defendants that the discretionary power conferred on the plaintiff by virtue of s 14(4)(m)(ii) of the Act has not been exercised in the spirit and intention of the Act when the plaintiff completely ignored the interests of the borrower and the first defendant in the face of all the special circumstances as explained earlier. This, according to the defendants, shows that the policy or the principle behind the Act has not been complied with and accordingly the plaintiff's executive action of arbitrarily exercising its right under s 14(4)(m)(ii) of the Act against the borrower and the first defendant should be condemned as unconstitutional.

[56] It is the submission of the defendants that notwithstanding the fact that there could be the situation that all of the provisions of the Act may satisfy the reasonable classification test, that is, that the provisions of the Act only applies to a person who is similarly circumstanced as the other persons in the classification, yet a satisfaction of the reasonable classification test does not automatically cloak all the provisions of the Act with constitutionality as such. It is also the submission of the defendants that the specifics of the employment of the law – particularly in instances where the law confers a discretionary power, by itself, within the class of persons who are similarly circumstanced may be challenged on its constitutionality if the discrimination is inherent in the law or if the executive action taken under the law is discriminatory. Now, past decisions have struck down laws on grounds of arbitrariness specifically on the grounds of discretion and discrimination. In *EP Royappa v State of Tamil Nadu & Anor* [1974] 2 SCR 348, at p 386, Bhagwati J, aptly said:

> The basic principle which, therefore, informs both arts 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., 'a way of life', and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of art 14, and if it affects any matter relating to public employment, it is also violative of art 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by arts 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the latter comprehends the former. Both are inhibited by arts 14 and 16.

And, subsequently, in the case of *Maneka Gandhi v Union Of India* [1978] 2 SCR 621, Bhagwati J, also said the same thing (see p 674 of the report):

> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades art 14 like a brooding omnipresence and the procedure contemplated by art 21 must answer the best (sic) (it should be 'test') of reasonableness in order to be in conformity with art 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of art 21 would not be satisfied.

[57] Again, in *Ramana Dayaram Shetty v The International Airport Authority of India and Ors* [1979] 3 SCR 1014, Bhagwati J, spoke against the arbitrary exercise of power in these trenchant terms (see pp 1031 to 1032 of the report):

> Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his '*The Law of the Constitution*' or the definition given by Hayek in his '*Road to Serfdom*' and '*Constitution of liberty*' or the exposition set-forth by Harry Jones in his '*The Rule of Law and the Welfare State*', there is, as pointed out by Mathew, J., in his article on '*The Welfare State, Rule of Law and Natural Justice' in 'Democracy, Equality and Freedom*,' 'substantial agreement is in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found'. It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

Continuing further at p 1042 of the report, his Lordship Bhagwati J, had this to say:

> This rule also flows directly from the doctrine of equality embodied in art 14. It is now well settled as a result of the decisions of this Court in *EP Rayappa v State of Tamil Nadu* [1974] 2 SCR 348: (AIR 1974 SC 555) and *Maneka Ghandhi v Union of India* [1978] 1 SCC 248: (AIR 1978 SC 597) that art 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by art 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.

[58] But, the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* after examining the various authorities including *EP Royappa v State of Tamil Nadu & Anor and Maneka Gandhi v Union of India* invariably dismissed the use of the rule against

arbitrariness in preference to the doctrine of reasonable classification. The defendants say that there is no conflict between the doctrine of reasonable classification and the rule against arbitrariness. In the continuously evolving concept of law, no restrictions may be imposed in the development of the law. The applicability of both the doctrines, according to the defendants, must be considered in the light of the facts and circumstances of each case and there is no question of a contest between these two doctrines. However, I must put on record that I am bound by the decision of the Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*. I now propose to embark on a brief exposition of that famous latin term: stare decisis et non quieta movere (to stand by and adhere to decisions and not disturb what is settled). It is used in common law systems to express the idea that prior superior court decisions must be recognised as precedents. A decision by a higher court constitutes binding precedent. Under the doctrine of stare decisis, a decision of the superior or higher court is important only for 'what' it decides and not for the 'why' nor for the 'how'. The application of the doctrine of stare decisis from a higher court to a lower court is also called as vertical stare decisis. While the notion that a judge is bound by or at least should respect decisions of earlier judges of similar or coordinate jurisdiction is called horizontal stare decisis. At times, horizontal stare decisis serves merely as a persuasive barometer for subsequent judges to follow. Now, although the lower courts are bound in theory by the superior or higher court precedents, in practice judges may sometimes attempt to evade precedents, by distinguishing them on spurious grounds. It is, however, advisable to follow the doctrine of stare decisis because it is a wise policy. It is important that the applicable law be settled. There must be certainty in the law. Benjamin Cardozo, in his treatise *The Nature of the Judicial Process, New Haven*, Yale University Press, aptly said that; Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice. I still speak reverently of the need to respect precedents. In *Payne v Tennessee* [1991] 501 US 808, Thurgood Marshall argued in dissent that this Court has repeatedly stressed that fidelity to precedent is fundamental to 'a society governed by the rule of law' ……. Stare decisis……. 'is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere existence of judicial will'. According to Howard J, Woodford, 1981, *Courts of Appeals in the Federal Judicial System, Princeton*: Princeton University Press, 'high on any judge's list of things he or she ought to do is to follow precedent.' I will now revert to the mainstream of the case.

[59] The defendants say that it is not known as to why the plaintiff opted to exercise its discretionary powers under s 14(4)(m)(ii) of the Act instead of s 14(4)(m)(i) of the Act by conducting negotiations with the borrower to mutually agree on an interest rate to be imposed on the loan. The defendants also say that in spite of a clear challenge by the defendants in these proceedings, apart from a bare denial by the plaintiff and/or an averment to the effect that the plaintiff has merely rightfully exercised its powers as conferred by the Act, nowhere does it appear in the cause papers filed by the plaintiff in these proceedings the reason and/or the rationality as to why the plaintiff sought to abandon the interest rates as provided for in the loan agreements between the borrower and AMBB. For my part, I agree when the plaintiff says that there is no requirement that the plaintiff provide reasons for any variation of the interest rate because s 14(4)(m) of the Act contains the provision that

the interest rate charged must be by mutual agreement or based on prior agreement. Furthermore, there is no question of discretion in the exercise of s 14(4)(m) of the Act. And neither is there an 'abandonment' of the interest rates stipulated under the overdraft facility agreements because the rate charged by the plaintiff is consistent with that as stipulated in the said agreements. Hence, there is no need for a trial or for *viva voce* evidence to be led at the trial.

[60] The defendants contend that the exercise by the plaintiff of its rights granted to it under s 14(4)(m)(ii) of the Act has been exercised solely with the purpose of avoiding the breach of the loan agreement between AMBB and the borrower and as such it is an act by the plaintiff which is, according to the defendants, unfair, inequitable and it infringes the fundamental rights of the borrower and the first defendant as is contained in art 8(1) of the Federal Constitution. The defendants then pose this question for this court to decide upon and that question is framed in this way: whether the defendants right of equal protection of the law under art 8 of the Federal Constitution has been infringed by the exercise of the discretion by the plaintiff under s 14(4)(m)(ii) of the Act? The defendants also contend that the plaintiff has abandoned the interest rates provided under the overdraft facility agreements in order to avoid the breach of the agreement between AMBB and the borrower. With respect, there is no basis for such a contention. Firstly, there was no abandonment of the interest rate under the overdraft facility agreements, given that the interest rate charged by the plaintiff is also 2% per annum above the BLR. Secondly, while the plaintiff denies that there was any such breach by AMBB, how is such a breach, if at all, which occurred prior to the vesting of the indebtedness with the plaintiff on 29 December 1999, be 'avoided' by the subsequent charge of a 'different' interest rate by the plaintiff? Thirdly, the defendants' contention is both illogical and contradictory: the defendants have alleged that the interest rate or scheme of interest fixed by AMBB prior to the vesting was wrong, yet the defendants are objecting to the change in the charge of interest by the plaintiff although it is commensurate with the facility agreements. It appears that as though the defendants are alleging that the plaintiff ought to have continued with the interest rate and scheme fixed by AMBB even after the vesting despite the fact that they allege that the interest rate and scheme are wrongful. In reality the true position is this. That whatever grievance or dispute the borrower or the defendants might have over the rate and scheme of interest applied by AMBB prior to the vesting, the rate and calculation of interest charged by the plaintiff after the vesting is a separate issue that both complies with the requirements of s 14(4)(m) of the Act and accepted by the borrower by virtue of its conduct and actions as alluded to earlier.

[61] Given the fact that:

(a) the interest rate of the overdraft facility does not in fact appear to have been varied; and

(b) in any event, the interest rate charged on the overdraft facility since the date of the vesting has been agreed or accepted by the borrower,

the defendants' long foray into the 'unconstitutionality' of s 14(4)(m) of the Act does not come into play, and at most is merely academic.

[62] The plaintiff says that the defendants have misled this court when they raised questions of the constitutionality of the provisions of the Act. The following matters, namely, the borrower's own request that the plaintiff take over its debt from AMBB, the notice to the borrower about the variation of the interest rate to 2% above the BLR, the fact that this 'variation' brings the interest rate within the terms of the overdraft facility agreements are within, at the very least, the first defendant's knowledge as the managing director of the borrower. According to the plaintiff, the defendants have refrained from disclosing those pertinent facts when they submitted on the constitutional issues as alluded to earlier.

[63] Reverting back to the constitutionality issue, the plaintiff submits that s 14(4)(m) of the Act cannot be impeached and it has the necessary legal effect notwithstanding any inconsistency with the provisions of the Federal Constitution. The plaintiff relies on the case of *Osman & Anor v Public Prosecutor* [1968] 2 MLJ 137, a Privy Council case, in support of its contention. But the defendants criticised that case. According to the defendants, the findings of the Privy Council must be confined to its peculiar facts and the surrounding circumstances of the case and it should not be applicable today. According to the defendants numerous written laws have been challenged on constitutionality grounds and the law journals are replete with such authorities. Viscount Dilhorne in delivering the decision of the Privy Council in *Osman & Anor v Public Prosecutor* aptly said at pp 138 to 139 of the report:

> Article 8(1) of the Constitution provides that all persons are equal before the law and entitled to the equal protection of the law. Mr. Le Quesne contended that the Emergency Regulations amounted to a denial of the equal protection of the law since persons tried under the Regulations were deprived of the benefits of the procedure under the Criminal Procedure Code and so were treated not equally but differently from persons tried under that Code. He therefore contended that they were inconsistent with the Constitution and so invalid.
>
> By art 150 of the Constitution the Yang di-Pertuan Agong was given power in certain circumstances to issue a proclamation of emergency, and, while such a proclamation was in force, Parliament was given power by art 150(5) notwithstanding anything in the Constitution, to make laws with respect to any matter if it appeared to Parliament that the law was required by reason of the emergency. Article 150(6) provided that subject to art 150(6A) (which is not relevant to this case), no provision of any Act of Parliament so passed should be invalid on the ground of inconsistency with any provision of the Constitution.
>
> Pursuant to the powers given by this article, the Emergency (Essential Powers) Act, 1964 was passed. This gave the Yang di-Pertuan Agong wide powers of making regulations, called in the Act the Essential Regulations, which he considered desirable or expedient for securing public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community.
>
> The Act expressly stated that the Essential Regulations might provide for amending, suspending or modifying any written law, and by s 2(4) declared that the Essential Regulations should have effect notwithstanding anything inconsistent therewith contained in any written law other than the Act itself or in any instrument having effect by virtue of any written law other than the Act itself.

Mr Le Quesne did not seek to challenge the validity of the Act. He contended that the words 'written law' in the Act were not, despite the Interpretation and General Clauses Ordinance 1948, to be interpreted as including the Constitution. He pointed out that art 150(5) of the Constitution itself distinguished between the Constitution and written law.

In the Ordinance it is stated that 'written law' means all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation(s) made thereunder and includes the Federal Constitution.

The Emergency (Criminal Trials) Regulations 1964 were made under the Emergency (Essential Powers) Act 1964 and if it were the case that the Regulations were inconsistent with the Constitution, nevertheless if 'written law' in s 2(4) of the Act includes the Constitution, the validity of the Regulations cannot be impeached.

Their Lordships can find nothing in the context which requires them to give a different meaning to the words 'written law' than that prescribed by the Ordinance and they do not consider that the words of art 150(5) 'any provision of this Constitution or of any written law' are any indication that the words 'written law' in the Act were intended to have any different meaning to that stated in the Ordinance.

For these reasons their Lordships are unable to accept this contention.

and I wholeheartedly agree with his Lordship's reasoning.

[64] It is the plaintiff's contention that any legal provision that is sought to be impeached on constitutional grounds must be based only on the grounds of religion, race, descent or place of birth and the plaintiff relies on the case of *Tan Hee Lock v Commissioner For Federal Capital & Ors*; *Haris bin Idris v Commissioner For Federal Capital & Ors* [1973] 1 MLJ 238, FC. But the defendants take an exception and say that the categories wherein discrimination can occur cannot be closed in the ever evolving concept of the law in this day and age. The defendants say that what was once a privilege to a person can over the passage of time become a human right and when discrimination of that right takes place, a citizen must be entitled to challenge that discrimination and/or the cause of the discrimination under the Federal Constitution.

[65] Sections 13 to 20 of the Act have been decreed to prevail over any existing law. Section 14(2) of the Act provides that, 'A vesting under sub-section (1) shall have effect according to the provisions of this part and, notwithstanding the provisions of the Civil Law Act 1956 or any other law, shall be binding on any person thereby affected in the manner provided in this Part.' The word 'law' has not been defined in the Act. Reference to the Interpretation Acts 1948 and 1967 reveals that the word 'law' is to have the meaning assigned to it by art 160(2) of the Federal Constitution. And art 160(2) of the Federal Constitution defines 'law' to include 'written law, the common law….and any custom or usage having the force of law …'. And 'written law' is held to include, both under art 160(2) of the Federal Constitution and the Interpretation Acts 1948 and 1967, the Federal Constitution and the Constitution of any State. To paraphrase, it comes to this. That s 14(2) of the Act provides that the plaintiff's rights and powers under s 13 to 20 of the Act shall have effect according to its provisions including therein s 14(4)(m) of the Act notwithstanding, inter alia,

the provisions of the Federal Constitution. Now, I say that the provisions of, inter alia, s 14(4)(m) of the Act bind any person affected. It is for this very reason that it can be argued that s 14(4) (m) of the Act cannot be impeached on the ground of inconsistency with art 8 of the Federal Constitution (*Osman & Anor v Public Prosecutor*). Thus, it can be surmised that the court is enjoined from acceding to the defendants' request to determine the constitutionality or otherwise of s 14 of the Act or parts thereof, not only for the procedural incorrectness of the proceedings before the court but also because the defendants do not have the substantive right in law to do so. The case of *Osman & Anor v Public Prosecutor* deals with the Emergency (Criminal Trials) Regulations 1964 which were made under the Emergency (Essential Powers) Act 1964. The said Regulations were argued to be inconsistent with art 8. The Emergency (Essential Powers) Act 1964 provided that the Regulations should have effect notwithstanding anything inconsistent therewith contained in any written law other than the Act itself, and 'written law' was given the meaning in the Interpretation and General Clauses Ordinance 1948 (the predecessor of the Interpretation Acts 1948 and 1967) which includes the Federal Constitution. However, it must be noted that the Emergency (Essential Powers) Act 1964 was passed pursuant to art 150 of the Federal Constitution which in itself allows Parliament to pass an Act notwithstanding anything in the Federal Constitution and holds valid any provision of such an Act even if inconsistent with the provisions of the Federal Constitution. In this regard, perhaps *Osman* may be distinguished from the present case because the Act was passed pursuant to art 66(5) of the Federal Constitution which makes no like provision for Parliament to act inconsistently with the Federal Constitution nor does it empower an Act of Parliament thereunder to be valid despite inconsistencies with the provisions of the Federal Constitution. Arguably therefore, while the Federal Constitution itself empowers Parliament to legislate or act inconsistently with the provisions of the Federal Constitution in certain circumstances, the provision of the Federal Constitution under which Parliament was moved to pass the Act did not allow or empower it to legislate inconsistently with the Federal Constitution.

[66] Then there is also the case of *Tan Hee Lock v Commissioner For Federal Capital & Ors* which must be referred to and has been referred to. There the Federal Court held that art 8 of the Federal Constitution is to be read as a whole and that the discrimination allegedly created by the legal provision that is sought to be impeached must be on one of the following grounds of religion, race, descent or place of birth (that is not otherwise expressly allowed by the Federal Constitution). And by the ratio of this case, it seems that the defendants having failed to denote how any discrimination under s 14 of the Act is grounded upon religion, race, descent or place of birth, is not in a position to move this court to impeach s 14 of the Act or any provisions made under the Act.

[67] In my judgment, s 14(4)(m) of the Act is not unconstitutional. The principles that govern the application of the doctrine of equality enshrined in art 8 of the Federal Constitution and such like principles have been culled from Malaysian cases on the subject, some of which include *Mohamed Sidin v Public Prosecutor* [1967] 1 MLJ 106, FC; *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128; *Public Prosecutor*

v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116, HC; *Public Prosecutor v Oh Keng Seng* [1976] 2 MLJ 125; *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166; *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 (FC); and *Malaysian Bar & Anor v Government Of Malaysia* [1987] 2 MLJ 165, SC. In developing such principles, the Malaysian courts have drawn inspiration from both the Indian and the American decisions which jurisdictions have similar provisions to our art 8 of the Federal Constitution. Let me set out the law in this fashion:

(a) The test of constitutionality is objective, not subjective. There is always a presumption in favour of constitutionality and the burden is upon him who challenges the provision to show that it is unconstitutional. Hashim Yeop A Sani J (as he then was and who later rose to be the Chief Justice (now Chief Judge) of Malaya) aptly said in *Public Prosecutor v Su Liang Yu* at pp 130 to 131 of the report:

> When a law is challenged as offending the guarantee of equality and equal protection of the law, the first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute and then to see whether a classification has been made and which does not result in a real or actual discrimination. In its approach to the problem the court ought prima facie, to lean in favour of constitutionality and should support the legislation if it is possible to do so on any reasonable ground and it is for the party who attacks the validity of the legislation to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable.

(b) The equality provision under art 8 of the Federal Constitution is not an absolute provision. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.

(c) The equality provision applies both to substantive as well as procedural law.

(d) The equality provision is qualified in that discrimination is permitted or lawful in certain circumstances where:

(i) it is provided within the provisions of the Federal Constitution itself (see arts 8(4), 8(5) and 153 of the Federal Constitution and the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor* at pp 165 to 166); and

(ii) where Parliament so legislates based on the doctrine of classification (see *Public Prosecutor v Su Liang Yu* at p 130; and *Mohamed Sidin v Public Prosecutor* at pp 108 to 109).

(e) In determining whether the discriminatory law is good law or not, the courts are to consider the reasonableness of the classification in the law and in assessing the reasonableness of the classification, the court will look at the following factors:

(i) whether the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(ii) whether the differentia has a rational relation to the object sought to be achieved by the law in question and what is necessary is that there must be a nexus between the basis of the classification and the object of the law in question.

(f) It must be borne in mind that the application of the doctrine of classification by the Malaysian courts is subject to the underlying principle that art 8 of the Federal Constitution merely guarantees that a law must operate and need only operate alike to all persons in the same circumstances in that a person in one class should be treated the same as another person in the same class (see *Public Prosecutor v Khong Teng Khen & Anor*; and *Datuk Haji Harun bin Haji Idris v Public Prosecutor*).

(g) It is also ideal to note that the reasonableness of the classification should be tested with reference to the circumstances existing at the time of the enactment of the statute in question and this includes matters of common knowledge, common report and the history of the times (see *Public Prosecutor v Su Liang Yu*).

[68] Now, the test to which a statute or provision thereunder is subjected to when determining its validity under art 8 of the Federal Constitution is as follows (see *Datuk Haji Harun bin Haji Idris v Public Prosecutor*; *Government of Malaysia v VR Menon* [1990] 1 MLJ 277, SC; and *Malaysian Bar & Anor v Government Of Malaysia*):

(a) Is the law discriminatory?

(b) If the law is discriminatory, is the unequal treatment allowed in that is it based on 'reasonable' or 'permissible' classification? In other words:

(i) Is the classification founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group?

(ii) Does the differentia have a rational relation to the object sought to be achieved by the law in question in that is there a nexus between the basis of the classification and the object of the law in question?

(c) In undertaking a review of the validity of a statute or provision, the following must be borne in mind:

(i) There is a presumption that the impugned statute or provision or law is constitutional.

(ii) The burden is on the person challenging the provision to show that it is unconstitutional.

[69] And, proceeding cautiously, in applying the test to the facts of the present case the following deductions may be arrived at:

(i) Section 14(4)(m) of the Act does not discriminate – it applies alike to all persons falling under the term 'obligors'. Article 8(1) of the Federal

Constitution does not proclaim that all persons must be treated alike, but only that persons in like circumstances must be treated alike (see *Public Prosecutor v Khong Teng Khen & Anor*; *Datuk Haji Harun bin Haji Idris v Public Prosecutor*; and *Public Prosecutor v Su Liang Yu*).

(ii) In any event, the limitation to or loss suffered by an obligor under s 14(4)(m) of the Act is not a substantive right but a procedural one in that the rights of the obligor are not forfeited; merely limited to monetary relief. By the same token the defendants have not shown what is the 'fundamental right' guaranteed by the Federal Constitution to the defendants that is allegedly being forfeited in this case (see *Datuk Haji Harun bin Haji Idris v Public Prosecutor*; and *Public Prosecutor v Su Liang Yu*) where s 418A of the Criminal Procedure Code was considered. The courts in both instances arrived at the same conclusion that the loss of the accused's right of a preliminary inquiry was not a fundamental right guaranteed by the Federal Constitution).

(iii) Even if there is discrimination, it is a permissible discrimination in that the classification of a group of people as 'obligors' is based on an '*intelligible differentia*' where that differentia has a 'rational relation to the object sought to be achieved' by the Act. The purpose of the Act was to create special provisions in the public interest to dispose of impaired assets of financial institutions by, inter alia, promptly and efficiently resolving non-performing loans and removing other assets and liabilities of such institutions. The ultimate goal of Parliament was to revitalise the national economy after the global economic crisis of the late 1990s. To this end, the plaintiff was incorporated to, inter alia, undertake and enforce the provisions of the Act. As stated above, the individuals or bodies targeted at were those with non-performing loans in certain financial institutions. The borrower and the first defendant in this case are such bodies or persons where the 'non-performing loan' was the debt that had accrued in the overdraft facility account held with AMBB.

[70] For the foregoing reasons, there is thus a reasonable classification of the persons falling within s 14(4)(m) of the Act and a nexus between the said provision and the object of the Act, and, consequently, the said section is not inconsistent with the qualified provision of equality under art 8 of the Federal Constitution and therefore it is not void under art 4(1) of the Federal Constitution.

[71] The defendants outright rejected the applicability of the Federal Court decision in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* when it comes to the consideration of the constitutionality of s 14(4)(m) of the Act. There are salient parts of the Federal Court judgment in the *Kekatong* case that the defendants have chosen to ignore which categorically state as follows:

(a) In considering the constitutionality of a legislation, the first step is to examine the purpose and policy of the statute.

(b) In this connection, the Federal Court in the Kekatong case has clearly looked to the preamble of the Act for the determination of the object and classification

of s 72 of the Act and went on to hold that the said section applies equally to all persons who are similarly circumstanced. A

(c) In like manner, s 14(4)(m) of the Act does not prescribe specific classes of persons to which it applies and aid must be obtained from the preamble to the Act. The judicial consideration of the Act in the *Kekatong* case concluded that the Act is to be of equal application to all persons who are similarly circumstanced. This is the finding of the Federal Court and this court is bound by it. There are no two ways about it. B

(d) The defendants have tried to derail this court's attention by alluding to the various categories in which a law may come up for questioning in regard to its validity that are set out in *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* and that was referred to by the Federal Court in the *Kekatong* case. The defendants have suggested that while s 72 of the Act is a category (i) case, s 14(4) (m) of the Act is a category (iii) or (v) case because it talks about a discretionary power conferred on a body. To me, it is an erroneous suggestion for the following reasons: C D

(a) In classifying the various categories, the entire statute itself must be considered in determining 'reasonable classification' of a law and not a section of a legislation per se. This is clear from the wording of the five categories as set out in the *Shri Ram Krishna Dalmia & Others v Shri Justice SR Tendolkar & Others* where the categories begin with the words, 'A statute may ….' In other words, in order to determine the classification and object of s 14(4)(m) of the Act one has to consider the Act. This is further borne out by the fact that s 14(4)(m) of the Act does not contain words limiting its application to specific classes. Section 14(4)(m) of the Act applies in like manner to all classes of persons that fall within the Act as a whole. And the classes of persons who fall within the ambit of the Act have been considered in the *Kekatong* case and the Federal Court has held that it applied equally to all persons. It is for this reason that s 14(4)(m) of the Act is not in breach of art 8(1) of the Federal Constitution. E F

(b) It is argued that s 14(4)(m) of the Act confers a discretion on the plaintiff and on that basis it is pointed out that that would take it out of category (i) as defined in *Shri Ram Krishna Dalmia & Others* and puts it into category (iii) or (v). By way of a rebuttal, I have this to say. There is no discretion conferred on the plaintiff by s 14(4)(m) of the Act. It is wrong to say that s 14(4)(m) of the Act confers a discretion on the plaintiff. In fact, it is a mandatory requirement in that it obliges the plaintiff to prescribe an interest rate in a specific manner when specific conditions exist, namely, when the interest rate under the original agreement is based on cost of funds, BLR or can no longer be determined as originally provided for. All that s 14(4)(m) of the Act does under sub-section (i) or sub-section (ii) is to provide alternatives, not a discretion. In any event, these alternatives cannot be discretionary because they are both subject to agreement by the obligor either by virtue of the fact that it is the original rate of interest contracted for by the obligor or it is a fresh understanding between the plaintiff and the obligor. Thus, there is no question of an arbitrary or unilateral exercise of s 14(4)(m) of the Act by the plaintiff. G H I

A CONCLUSION

[72] For all these varied reasons, I allow prayer (i) of encl 8 with costs.

Application allowed with costs.

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Reported by Brendan Navin Siva

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